

JAN -17 1991

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CLERK

In The
Supreme Court of the United States
October Term, 1990

JILL S. KAMEN,

Petitioner,

v.

KEMPER FINANCIAL SERVICES, INC., and
CASH EQUIVALENT FUND, INC.,

Respondents.

On Writ Of Certiorari To The United States
Court Of Appeals For The Seventh Circuit

JOINT APPENDIX

RICHARD M. MEYER
Suite-4915
One Pennsylvania Plaza
New York, New York 10119
(212) 594-5300
Attorney for Petitioner

JOAN M. HALL*
JOEL T. PELZ
JEANINE M. JIGANTI
JENNER & BLOCK
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350

*Attorneys for Respondent
Kemper Financial Services, Inc.*

MARTIN M. RUKEN
VEDDER, PRICE, KAUFMAN
& KAMMHOLZ
222 North La Salle Street
Chicago, Illinois 60601
(312) 609-7500

*Attorneys for Respondent
Cash Equivalent Fund, Inc.*

*Counsel of Record

Petition For Certiorari Filed September 24, 1990
Certiorari Granted December 3, 1990

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GENERAL DOCKET
U.S. COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

89-2967

Kamen, Jill S. v. Kemper Financial, et al
Appeal from: United States District Court
civil - private - none
Filed: 9/14/89
Fee status: paid

Caption

JILL S. KAMEN,
Plaintiff-Appellant

v.

KEMPER FINANCIAL SERVICES,
INCORPORATED and CASH EQUIVALENT
FUND, INCORPORATED,
Defendants-Appellees

| | |
|---------|---|
| 9/14/89 | Private civil case docketed. [89-2967] [87735-1] Appearance form due on 9/25/89 for Jill S. Kamen, for Kemper Financial, for Cash Equivalent. Tran- script information sheet due 9/25/89 for Richard Meyer, for Clifford Yuknis, for Joel Sprayregen. Appellant's brief due 10/24/89 for Jill S. Kamen. (elea) |
| 11/3/89 | Filed instanter motion by Appellant Jill S. Kamen to file appellant's brief. [103327-1] [89-2967] [103327-1] (ther) |
| 11/6/89 | ORDER issued GRANTING instanter motion to file appellant's brief. [103327-1] The clerk of this court is directed to file instanter the tendered copies of the appellant's brief. [89-2967] [103327-1] (gina) |

11/6/89 ORDER: The following briefing schedule is hereby adopted: [89-2967] [87735-1] 2. The appellee(s) brief is due on or before 12/6/89 for Cash Equivalent, for Kemper Financial 3. The reply brief if any is due on 12/20/89 for Jill S. Kamen (gina)

11/6/89 Filed 15c appellant's brief by Jill S. Kamen. Per order [89-2967] [103630-1] (gina)

12/1/89 Filed 10c joint appendix by Appellant Jill S. Kamen, Appellee Kemper Financial, Appellee Cash Equivalent. Per order. [89-2967] [111626-1] (gina)

12/6/89 Filed motion by Appellee Cash Equivalent to adopt brief of Appellee Kemper Financial. [112103-1] [89-2967] (gina)

12/6/89 Filed 15c appellee's brief by Kemper financial, Cash Equivalent. [89-2967] [112351-1] (gina)

12/19/89 Filed 15c appellant's reply brief by Jill S. Kamen [89-2967] [116565-1] (gina)

2/21/90 ORDER: Argument set for Thursday, April 12, 1990 at 9:30 a.m. Each side limited to 20 minutes. [89-2967] [133967-1] (terr)

3/27/90 ORDER: Argument set for Friday, May 11, 1990 at 9:30 a.m. Each side limited to 20 minutes. [89-2967] [145418-1] (broo)

5/11/90 Case heard and taken under advisement by panel: Judge Initials: wjc fhe kfr Circuit Judge Walter J. Cummings, Circuit Judge Frank H. Easterbrook, Circuit Judge Kenneth F. Ripple. [89-2967] [160336-1] (broo)

5/11/90 Case argued by Joan M. Hall for Appellee Cash Equivalent, Appellee Kemper

Financial, Richard Meyer for Appellant Jill S. Kamen. [89-2967] [87735-1] (broo)

7/18/90

Filed opinion of the court by Judge Easterbrook. The judgment of the district court is AFFIRMED in part, REVERSED in part, and REMANDED for further proceedings on the claim under Section 36(b). Cummings, Easterbrook, Ripple [89-2967] [87735-1] (patb)

7/18/90

ORDER: Final judgment: AFFIRMED in part, REVERSED in part and REMANDED for further proceedings on the claim under Section 36(b). Each party to bear their own costs. [89-2967] [178221-1] (patb)

UNITED STATES DISTRICT COURT DOCKET

| | | | |
|---------|---|--|-----------|
| | | | 85 C 4587 |
| 5/14/85 | 1 | Filed 5/10/85 Complaint (JS-5) | |
| 6/5/85 | 5 | Filed 6/4/85: Notice of motion; Motion to extend time. | |
| 6/5/85 | 7 | Enter order dated 6/4/85: there being no objection, court grants defendant's motion for extension of time to July 2, 1985 in which to answer or otherwise plead. Status hearing set for July 9, 1985 at 9 AM. - Nordberg, J. | |
| | | Mld notices 6/5/85 | GV |
| 7-3-85 | 8 | Filed 7-2-85 notice of filing of Kemper Financial; motion to strike to dismiss PS | |
| 7-3-85 | 9 | Filed 7-2-85 notice of filing of Kemper Financial; answer | PS |

- 7-3-85 10 Filed 7-2-85 Kemper Financial's memorandum in support of its motion to strike and dismiss PS
- 7-3-85 11 Filed 7-2-85 motion of defendant Cash equivalent to strike and dismiss PS
- 7-3-85 12 Filed 7-2-85 answer and affirmative defenses of Cash Equivalent
- 7/11/85 16 Enter order dated 7/2/85: Court grants defendants' motion to dismiss with respect to lack of demand on Board of Directors. Plaintiff granted leave to file amended complaint by July 29, 1985. Court grants plaintiff's oral motion for leave for Richard Meyer to appear pro hac vice. Answer brief to motion due July 29, 1985. Reply due Aug. 6, 1985. - Nordberg, J
No notices required. GV
- 7/24/85 17 Filed 7/23/85 plaintiff's Notice of Filing and Amended Complaint and Jury Demand tcm
- 8/27/85 20 Filed 8/27/85 Notice of filing Appendix A to Plaintiff's Memorandum in Opposition to Defendants' Motion to Strike. tcm
- 9/3/85 21 Filed 8/30/85 defendant Kemper's Notice of Filing and Reply Memorandum in Support of Its Motion to Strike and Dismiss tcm
- 9/3/85 22 Filed 8/30/85: Reply Memorandum of Defendant Cash Equivalent Fund, Inc. in Support of Its Motion to Strike and Dismiss tcm
- 12/09/86 46 Minute order of 12/08/86: Plaintiff's motion to file supplemental complaint instant is granted. Defendants are to answer or otherwise plead to supplemental complaint or by December 23, 1986. - NORDBERG, J.
Mailed notices 12/09/86

- 48 Filed 12/08/86: Plaintiff's motion to file supplemental complaint; memorandum in support; Supplemental AMENDED COMPLAINT.
- 12/30/86 56 Filed 12/29/86: Notice of filing; defendant Kemper's answer to supplemental amended complaint. tcm
- 12/31/86 58 Filed 12/30/86: Answer of defendant Cash Equivalent Fund to supplemental amended complaint. tcm
- 01/29/87 62 Filed 01/28/87: Notice of motion; Defendant Kemper Financial Service Inc.'s motion to dismiss.
- 63 Filed 01/28/87: Memorandum in support of motion to dismiss.
- 64 Filed 01/28/87: Exhibits to memorandum in support of motion to dismiss. etv
- 02/04/87 65 Minute order of 02/02/87: Judgment is entered as follows: Enter memorandum opinion and order dismissing plaintiff's section 20(a) claim for failure to make a demand on the Fund's Board of Directors. In addition, the court finds that plaintiff is not entitled to a jury trial on her section 36(b) claim and grants KFS' motion to strike her jury demand. For further detail see order attached to the original minute order form. - Nordberg, J.
Mailed notices 02/04/87. (Mailed drafts 02/04/87. TPH
- 02/12/87 66 Filed 02/11/87: Notice of filing; Plaintiff's motion for reconsideration. tcm
- 02/13/87 67 Minute order of 02/10/87: Answer brief to motion for reconsideration due February 23, 1987. Filed Plaintiff's motion fo

- reconsideration - Nordberg, J.
Mailed notices 02/13/87. TPH
- 02/24/87 68 Filed 02/23/87: Defendant's notice of filing; Response of Cash Equivalent Fund, Inc. to plaintiff's motion for reconsideration.
- 69 Filed 02/23/87: Defendant Kemper Financial Services' response to plaintiff's motion for reconsideration.
- 03/03/87 71 Filed 03/02/87: Notice of filing; Plaintiff's memo in opposition to defendant Kemper Financial Service's motion to dismiss; attachments. GV
- 03/12/87 72 Minute Order of 03/11/87: The court denies plaintiff's motion for reconsideration. For further detail see order on the reverse of the original minute order form. - Nordberg, J.
Mailed notices 03/12/87. etv
- 03/20/87 75 Filed 03/19/87: Notice of filing; Kemper Financial Services' reply memorandum in support of its motion to dismiss or for summary judgment; attachments. TPH
- 03/27/87 77 Filed 03/26/87: Reply memorandum of defendant Cash Equivalent Fund, Inc. in support of its motion to dismiss or for summary judgment. tcm
- 04/24/89 88 Entered 04/21/89: Report and Recommendation of Magistrate James T. Balog. PG
- 05/01/89 89 Filed 04/28/89: Plaintiff's notice of filing; Objection to the report and recommendation of Magistrate James T. Balog (attachments). ALR
- 05/05/89 90 Filed 05/02/89: Notice of filing; Plaintiff Jill S. Kamen's amended objection to the

- report and recommendation of Magistrate James T. Balog (Exhibits). PG
- 05/15/89 91 Filed 05/12/89: Defendant Kemper Financial Services, Inc.'s notice of filing; Response to plaintiff's objection to the report and recommendation of Magistrate James T. Balog. DMK
- 06/01/89 92 Minute order of 05/31/89: Hearing held. Court grants plaintiff's motion for leave to file reply to defendant's response instant. Nordberg, J.
No notice mailed.
- 93 Filed 05/31/89: Notice of motion; Motion; Reply to defendant's response. ALR
- 08/04/89 96 Minute order of 08/03/89: The court overrules plaintiff's objections to the Magistrate's report and recommendation of April 21, 1989. The Court adopts the Magistrate's report and recommendation. Accordingly, based upon the reasons set forth in the report and recommendation and in defendant's brief in support of its motion for summary judgment, the Court grants defendant's motion for summary judgment on the issue of plaintiff's adequacy as a class representative. This cause may proceed, if plaintiff so chooses, as a non-class action. A status hearing is set for August 15, 1989, at 2:00 p.m. before Judge Aspen. It is so ordered. Aspen, J.
Mailed notice 08/04/89. GV
- 09/07/89 98 Minute order of 09/01/89; Judgment is entered as follows: Since in our August 3, 1989 order, plaintiff was adjudicated as a non-adequate representative, plaintiff cannot proceed individually in this 36(b)

action. For that reason, our August 3, 1989 order is amended by deleting the following sentence: "this cause may proceed, if plaintiff so chooses, as a non-class action." Accordingly, judgment is entered in favor of defendants. It is so ordered. Status hearing held, Aspen, J. Notice mailed by judges staff 09/06/89.

| | | | |
|----------|-----|--|------|
| | 99 | Entered judgment. Clerk. | FMP |
| | | | JS-6 |
| 09/14/89 | 100 | Filed 09/13/89: Plaintiff's NOTICE OF APPEAL re. order dated 09/01/89 (\$105.00 Paid.) | |
| 10/18/89 | 106 | Filed 10/17/89: Plaintiff's notice of filing: Parties stipulation to supplement the record; (Attachments). | GV |
| 10/18/89 | - | Certified and transmitted 10/18/89 to the 7th Circuit Court of Appeals; Supplemental record on appeal consisting of one volume of pleadings, together with transmittal letter. | |

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

| | | |
|----------------------------|---|-----------|
| JILL S. KAMEN, | X | COMPLAINT |
| | : | |
| Plaintiff, | : | PLAINTIFF |
| | : | DEMANDS |
| - against - | : | TRIAL |
| KEMPER FINANCIAL SERVICES, | : | BY JURY |
| INC., and CASH EQUIVALENT | : | JUDGE |
| FUND, INC., | : | NORDBERG |
| | : | 85C04587 |
| Defendants. | : | |
| | X | |

Plaintiff, by her attorneys, alleges as follows, on information and belief, except as to the allegations in paragraph 3, which are alleged on knowledge:

1. This Court has jurisdiction of this action under the Investment Company Act of 1940 as amended, 15 U.S.C. § 80a-1 et seq. (the "Act"), and in particular § 36 and § 44 thereof, 15 U.S.C. § 80a-35 and § 80a-43.

2. The cause of action arises under the Act and in particular under § 20 and § 36 thereof.

3. Plaintiff is a shareholder of defendant Cash Equivalent Fund, Inc. (the "Fund") and has been a shareholder of the Fund at all times relevant herein. Plaintiff brings this action on behalf of the Fund.

4. The Fund is a diversified open-end investment company registered with the Securities and Exchange Commission under the Act. Its principal place of business is located at 120 South LaSalle Street, Chicago, Illinois.

60603. It is the type of investment company commonly referred to as a money market fund.

5. The Fund's investment objective is to seek the maximum current income consistent with stability of capital. The Fund invests in a range of short-term money market instruments which have maturities not exceeding one year. These instruments include obligations of the United States Government and its agencies and instrumentalities, certificates of deposit, bankers acceptances, fixed time deposits, commercial paper, and repurchase agreements. Although the Fund did not commence operations until March 16, 1979, its total assets as of April 23, 1985 were approximately \$4,683,000,000.

6. At all times relevant herein, defendant Kemper Financial Services, Inc. ("KFS") has acted as investment adviser, manager, primary administrator and underwriter for the Fund.

7. During all times relevant herein, KFS has received and continues to receive a monthly fee divided into two parts and paid under two separate agreements. Under an investment management agreement, the Fund pays KFS an investment management fee at the annual rate of .22 of 1% of the first \$500,000,000 of the combined average daily net assets of the portfolios KFS manages, .20 of 1% of the next \$500,000,000, .175 of 1% of the next \$1 billion, .16% of the next \$1 billion and .15 of 1% of average daily net assets of such portfolios over \$3 billion. Under an administration, shareholder services and distribution agreement ("administration agreement") the Fund pays KFS an annual fee, payable monthly, on a basis of .33% of the first \$500,000,000 of average daily net assets,

.30% of the next \$500,000,000, .275% of the next \$1 billion, .265% of the next \$1 billion, and .25% of average daily net assets over \$3 billion.

8. Because of the tremendous growth in the size of the Fund, the fees paid and payable to KFS have increased enormously. Thus, for the fiscal year ended July 31, 1984, the Fund paid KFS nearly \$20,000,000 in fees. Of this amount, \$7,481,000 was paid under the investment management agreement and \$11,936,000 was paid under the administration agreement. KFS has entered into related services agreements with various firms and, during the 1984 fiscal year paid \$11,602,000 to such firms. Of that amount, \$2,817,000 was paid to broker-dealer firms affiliated with Kemper Corporation, of which KFS is a wholly owned subsidiary. At the present time, the Fund's obligations to KFS under the agreements have increased with the size of the Fund and are running at a rate in excess of \$20,000,000 per year.

9. Unlike most other investment companies, the management of the assets of a money market fund, such as the Fund herein, does not require the detailed analysis of industries nor of complex industrial companies and the concomitant retention of a large staff of highly paid and sophisticated securities analysts. Indeed, the assets of the fund, are and have been, invested in a relatively concentrated manner in fixed income obligations maturing in one year or less. In the ordinary course of operations, decisions to purchase are made on the same day that the funds are received.

10. Despite the huge growth in the size of the Fund, no change in the fee structure has been made since

December 1, 1981 when, in spite of the economies of scale resulting from the Fund's enormous growth, the fees were increased by virtue of the adoption of the administration agreement.

11. As a result of the tremendous increase in the assets of the Fund, the compensation paid and payable to KFS has increased enormously and disproportionately to the services rendered by it.

12. In addition to acting as investment manager to the Fund, KFS also acts as an investment manager to numerous other accounts and investment companies. Among those investment companies is Kemper Money Market Fund, Inc. ("MM"). MM, like the Fund, is a money market fund with the identical objective of obtaining maximum current income to the extent consistent with stability of principal. It is approximately the same size as the Fund, has approximately the same number of shareholders, and invests in the same types of securities as does the fund. The directors and many of the officers and other personnel servicing MM are the same as those performing services for the Fund. KFS is the investment adviser, manager, and underwriter for MM and supplies to MM substantially the same services that it supplies or causes to be supplied to the Fund. Yet, KFS exacts substantially greater fees from the Fund than it does from MM and many of its other clients. Thus, in the year ended July 31, 1984, the Fund's expenses were .72% of its average net assets, whereas those of MM were only .53%, and in every year since 1981 the expenses of the Fund have been significantly greater than those of MM. As a result, the Fund's yield for the year ended September 30, 1984 was approximately 21 basis points less than that of MM,

so that the Fund's investment objective of obtaining maximum current income consistent with stability was effectively thwarted by KFS's exaction of exorbitant fees.

13. On or about September 12, 1984, KFS caused to be distributed to the shareholders of the Fund a proxy statement for the annual meeting of shareholders on November 8, 1984. One of the principal purposes of the meeting which KFS was eager to accomplish was to obtain shareholder approval of the continuance of the investment management agreement between the Fund and KFS. The shareholders were asked to approve the agreement and were offered no alternative in the event of disapproval. As part of this solicitation, the proxy statement compared the services and fees offered and received by KFS from other investment companies. The proxy statement correctly described the services rendered to MM as being similar to those rendered to the Fund, but it misleadingly described the fees charged to MM as consisting of "a maximum fee of .50 of 1% of the first \$215,000,000 with lesser rates on additional assets." This gave the false impression that the fees paid by MM were as high or higher than the fees paid by the Fund, whereas KFS knew that the fees received by it from MM were substantially lower than those received by it from the Fund, and that, in fact, for the year ended July 31, 1984 the fees received by KFS from MM aggregated only .28% of MM's average daily net assets. In disseminating the proxy statement to the shareholders of the Fund, KFS used the mails and means and instrumentalities of interstate commerce in violation of § 20 of the Act. The solicitation was successful, and KFS obtained shareholder approval of its management agreement with the Fund.

14. Because of the limited number, nature and variety of the Fund's investments, the investment decisions of the Fund can be made by a single person, or, at most, a handful of persons. The research and advisory activities of KFS are merely routine and administrative in nature, do not require any significant expertise or investment acumen, are performed (and were performed prior to the formation of the Fund) by KFS for other of its accounts, and consist principally of purchasing and "turning over" money market instruments with a limited number of institutions. The incremental costs to KFS of performing these services for the Fund is minimal. In short, the investment advice provided by KFS is not worth the fees paid for that advice by the Fund and has not been worth the fees paid during the period covered by this complaint. Other advisers performed and have performed similar or superior services for lesser rates.

15. The advisory and management fees paid by the Fund to KFS are exorbitant, unreasonable, excessive and completely disproportionate to the services rendered in return therefore.

16. Pursuant to § 36(b) of the Act, KFS has a fiduciary duty with respect to the receipt of compensation from the Fund. By virtue of the foregoing, KFS has breached its fiduciary duty to the Fund.

17. No demand has been made by the plaintiff upon the Fund or its directors to institute or prosecute this action because no such demand is required under § 36(b) of the Act.

WHEREFORE, plaintiff prays for judgment:

- (1) requiring KFS to pay to the Fund its damages;
- (2) awarding plaintiff the costs and expenses of this action, including reasonable attorneys' fees; and
- (3) awarding plaintiff such other and further relief as the Court may deem just and proper.

Dated: New York, New York
May 1, 1985

JOEL J. SPRAYREGEN
CLIFFORD E. YUKNIS
SHEFSKY, SAITLIN & FROELICH,
LTD.

By: /s/ Joel J. Sprayregen
444 North Michigan Avenue
Suite 2300
Chicago, Illinois 60611
(312) 527-4000

RICHARD M. MEYER
MILBERG WEISS BERSHAD
SPECTHRIE & LERACH

By: /s/ Richard M. Meyer
One Penn Plaza
New York, New York 10119
(212) 594-5300
ATTORNEYS FOR PLAINTIFF

PLAINTIFF'S VERIFICATION

STATE OF New York)
COUNTY OF Nassau : SS.:
)

JILL S. KAMEN, being duly sworn, deposes and says that I am the plaintiff named herein, and that I have read

the foregoing Complaint and know the contents thereof, and that the same is true to my own knowledge except as to those matters therein stated to be alleged upon information and belief and as to those matters I believe them to be true.

/s/ Jill S. Kamen
JILL S. KAMEN

Sworn to before me this
4th day of May, 1985

/s/ Robert H. Garvar
NOTARY PUBLIC

ROBERT H. GARVAR
Notary Public State of New York
No. (illegible)
Qualified in Nassau County
Cert. Filed in Kings County
Commission Expires March 30, 1987

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

| | | |
|----------------------------|---|----------------|
| JILL S. KAMEN, |) | |
| |) | |
| Plaintiff, |) | |
| v. |) | No. 85 C 4587 |
| KEMPER FINANCIAL SERVICES, |) | |
| INC., and CASH EQUIVALENT |) | Judge Nordberg |
| FUND, INC., |) | |
| Defendants. |) | |

ANSWER AND AFFIRMATIVE DEFENSES OF
DEFENDANT CASH EQUIVALENT FUND, INC.

Defendant, CASH EQUIVALENT FUND, INC. (the "Fund"), by its attorneys, answers the Complaint of Plaintiff, JILL S. KAMEN ("Kamen"), as follows:

"1. This Court has jurisdiction of this action under the Investment Company Act of 1940 as amended, 15 U.S.C. § 80a-1 et seq. (the "Act"), and in particular § 36 and § 44 thereof, 15 U.S.C. § 80a-35 and § 80a-43."

1. The Fund admits that Kamen purports to base subject matter jurisdiction on Sections 36 and 44 of the Investment Company Act of 1940 as amended (the "Act") but denies that the Complaint states a cause of action cognizable against the Fund under the aforementioned statute.

"2. The cause of action arises under the Act and in particular under § 20 and § 36 thereof."

2. The Fund admits that Kamen purports to base her claims on Sections 20 and 36 of the Act but denies that Kamen's Complaint states a cause of action cognizable

against the Fund under the aforementioned statute. The Fund further states that Kamen does not have standing to institute an action pursuant to Section 20 of the Act.

"3. Plaintiff is a shareholder of defendant Cash Equivalent Fund, Inc. (the "Fund") and has been a shareholder of the Fund at all times relevant herein. Plaintiff brings this action on behalf of the Fund."

3. The Fund admits that Kamen has been a shareholder of the Money Market Portfolio of the Fund since December 31, 1981 and that Kamen purports to bring this action on behalf of the Fund.

"4. The Fund is a diversified open-end investment company registered with the Securities and Exchange Commission under the Act. Its principal place of business is located at 120 South LaSalle Street, Chicago, Illinois 60603. It is the type of investment company commonly referred to as a money market fund."

4. The Fund admits the allegations in Paragraph 4.

"5. The Fund's investment objective is to seek the maximum current income consistent with stability of capital. The Fund invests in a range of short-term money market instruments which have maturities not exceeding one year. These instruments include obligations of the United States Government and its agencies and instrumentalities, certificates of deposit, bankers acceptances, fixed time deposits, commercial paper, and repurchase agreements. Although the Fund did not commence operations until March 16, 1979, its total assets as of April 23, 1985 were approximately \$4,683,000,000."

5. The Fund denies that the total assets of the Fund as of April 23, 1985 were approximately \$4,683,000,000 and,

further answering, states that the total assets of the Fund as of April 23, 1985 were approximately \$5,172,000,000. The Fund admits the remaining allegations in Paragraph 5.

"6. At all times relevant herein, defendant Kemper Financial Services, Inc. ("KFS") has acted as investment adviser, manager, primary administrator and underwriter for the Fund."

6. The Fund admits the allegations in Paragraph 6.

"7. During all times relevant herein, KFS has received and continues to receive a monthly fee divided into two parts and paid under two separate agreements. Under an investment management agreement, the Fund pays KFS an investment management fee at the annual rate of .22 of 1% of the first \$500,000,000 of the combined average daily net assets of the portfolios KFS manages, .20 of 1% of the next \$500,000,000, .175 of 1% of the next \$1 billion, .16% of the next \$1 billion and .15 of 1% of average daily net assets of such portfolios over \$3 billion. Under an administration, shareholder services and distribution agreement ("administration agreement") the Fund pays KFS an annual fee, payable monthly, on a basis of .33% of the first \$500,000,000 of average daily net assets, .30% of the next \$500,000,000, .275% of the next \$1 billion, .265% of the next \$1 billion, and .25% of average daily net assets over \$3 billion."

7. The Fund denies that it pays KFS "a monthly fee" but admits the remaining allegations in Paragraph 7.

"8. Because of the tremendous growth in the size of the Fund, the fees paid and payable to KFS have increased enormously. Thus, for the fiscal year ended July 31, 1984, the Fund paid

KFS nearly \$20,000,000 in fees. Of this amount, \$7,481,000 was paid under the investment management agreement and \$11,936,000 was paid under the administration agreement. KFS has entered into related services agreements with various firms and, during the 1984 fiscal year paid \$11,602,000 to such firms. Of that amount, \$2,817,000 was paid to broker-dealer firms affiliated with Kemper Corporation, of which KFS is a wholly owned subsidiary. At the present time, the Fund's obligations to KFS under the agreements have increased with the size of the Fund and are running at a rate in excess of \$20,000,000 per year."

8. The Fund admits that for the fiscal year ended July 31, 1984, it paid KFS approximately \$7,481,000 in fees under the investment management agreement and approximately \$11,936,000 in fees under the administration, shareholder services and distribution agreement.

The Fund further admits that during fiscal 1984, KFS paid approximately \$11,602,000 of the \$11,963,000 to various firms with which KFS had entered into service agreements in order to obtain services for shareholders of the Fund. The Fund further admits that of the \$11,602,000, approximately \$2,817,000 was paid to broker dealers affiliated with Kemper Corporation, of which KFS is a wholly owned subsidiary. The Fund admits that its obligations to KFS under the agreements are based on the Fund's net assets and, therefore, fluctuate with fluctuations in the size of the Fund.

The Fund denies each and every remaining allegation in Paragraph 8.

"9. Unlike most other investment companies, the management of the assets of a

money market fund, such as the Fund herein, does not require the detailed analysis of industries nor of complex industrial companies and the concomitant retention of a large staff of highly paid and sophisticated securities analysts. Indeed, the assets of the fund, are and have been, invested in a relatively concentrated manner in fixed income obligations maturing in one year or less. In the ordinary course of operations, decisions to purchase are made on the same day that the funds are received."

9. The Fund admits that assets of the Fund are invested in fixed income obligations maturing in one year or less and that in the ordinary course of operations, decisions to invest are made on the same day that the funds are received or shortly thereafter. The Fund denies each and every remaining allegation in Paragraph 9.

"10. Despite the huge growth in the size of the Fund, no change in the fee structure has been made since December 1, 1981 when, in spite of the economies of scale resulting from the Fund's enormous growth, the fees were increased by virtue of the adoption of the administration agreement."

10. The Fund admits that in November 1981, the administration, shareholder services and distribution agreement was adopted pursuant to and in accordance with Rule 12b-1 as adopted by the Securities and Exchange Commission under the Act; that the Fund pays fees to KFS pursuant to the terms of the administration, shareholder services and distribution agreement; and, that all but a small portion of those fees are paid to various firms that provide services to shareholders of the Fund. The Fund further admits that there has been no change in the fee structure since December 1, 1981 and that the combined

fees under the investment management agreement and under the administration, shareholder services and distribution agreement, expressed as a combined percentage of the Fund's net assets, after said date, are higher than the investment management fee alone was previously. The Fund denies each and every remaining allegation in Paragraph 10.

"11. As a result of the tremendous increase in the assets of the Fund, the compensation paid and payable to KFS has increased enormously and disproportionately to the services rendered by it."

11. The Fund denies the allegations in Paragraph 11.

"12. In addition to acting as investment manager to the Fund, KFS also acts as an investment manager to numerous other accounts and investment companies. Among those investment companies is Kemper Money Market Fund, Inc. ("MM"). MM, like the Fund, is a money market fund with the identical objective of obtaining maximum current income to the extent consistent with stability of principal. It is approximately the same size as the Fund, has approximately the same number of shareholders, and invests in the same types of securities as does the fund. The directors and many of the officers and other personnel servicing MM are the same as those performing services for the Fund. KFS is the investment adviser, manager and underwriter for MM and supplies to MM substantially the same services that it supplies or causes to be supplied to the Fund. Yet, KFS exacts substantially greater fees from the Fund than it does from MM and many of its other clients. Thus, in the year ended July 31, 1984, the Fund's expenses were .72% of its average net assets, whereas those of MM were only

.53%, and in every year since 1981 the expenses of the Fund have been significantly greater than those of MM. As a result, the Fund's yield for the year ended September 30, 1984 was approximately 21 basis points less than that of MM, so that the Fund's investment objective of obtaining maximum current income consistent with stability was effectively thwarted by KFS's exaction of exorbitant fees."

12. The Fund admits that KFS acts as investment manager to the Fund and other accounts and investment companies, including Kemper Money Market Fund, Inc. ("MM"), a money market fund whose investment objective of obtaining maximum current income to the extent consistent with stability of principal, is identical to that of the Fund and which invests in substantially the same types of securities as the Fund, and that the directors and many of the officers and other personnel servicing MM are the same as those performing services for the Fund. Further answering, the Fund states that MM is available to investors directly through KFS, whereas the Fund is available only through certain broker dealer and other firms. KFS is the investment adviser, manager and underwriter for MM. Further answering, the Fund states that as of April 23, 1985, the total assets of the Fund were approximately \$5,172,000,000 and the total assets of MM were approximately \$4,736,000,000. Further answering, the Fund states that as of April 30, 1985, it had approximately 680,000 shareholders and MM had approximately 378,000 shareholders. The Fund further states that for the year ended July 31, 1984, the ratio of expenses to average net assets was .72% for the Money Market Portfolio of the Fund and .53% for MM.

The Fund denies each and every remaining allegation in Paragraph 12.

"13. On or about September 12, 1984, KFS caused to be distributed to the shareholders of the Fund a proxy statement for the annual meeting of shareholders on November 8, 1984. One of the principal purposes of the meeting which KFS was eager to accomplish was to obtain shareholder approval of the continuance of the investment management agreement between the Fund and KFS. The shareholders were asked to approve the agreement and were offered no alternative in the event of disapproval. As part of this solicitation, the proxy statement compared the services and fees offered and received by KFS from other investment companies. The proxy statement correctly described the services rendered to MM as being similar to those rendered to the Fund, but it misleadingly described the fees charged to MM as consisting of "a maximum fee of .50 of 1% of the first \$215,000,000 with lesser rates on additional assets." This gave the false impression that the fees paid by MM were as high or higher than the fees paid by the Fund, whereas KFS knew that the fees received by it from MM were substantially lower than those received by it from the Fund, and that, in fact, for the year ended July 31, 1984 the fees received by KFS from MM aggregated only .28% of MM's average daily net assets. In disseminating the proxy statement to the shareholders of the Fund, KFS used the mails and means and instrumentalities of interstate commerce in violation of § 20 of the Act. The solicitation was successful, and KFS obtained shareholder approval of its management agreement with the Fund."

13. Concurrent with filing its Answer herein, the Fund has moved to strike and dismiss those portions of

Kamen's Complaint that purport to state a claim pursuant to Section 20 of the Act. The allegations in Paragraph 13 relate only to Kamen's claim brought pursuant to Section 20 and, accordingly, the Fund will answer these allegations, if necessary, after the disposition of said motion.

"14. Because of the limited number, nature and variety of the Fund's investments, the investment decisions of the Fund can be made by a single person, or, at most, a handful of persons. The research and advisory activities of KFS are merely routine and administrative in nature, do not require any significant expertise or investment acumen, are performed (and were performed prior to the formation of the Fund) by KFS for other of its accounts, and consist principally of purchasing and "turning over" money market instruments with a limited number of institutions. The incremental costs to KFS of performing these services for the Fund is minimal. In short, the investment advice provided by KFS is not worth the fees paid for that advice by the Fund and has not been worth the fees paid during the period covered by this complaint. Other advisers performed and have performed similar or superior services for lesser rates."

14. The Fund denies the allegations in Paragraph 14.

"15. The advisory and management fees paid by the Fund to KFS are exorbitant, unreasonable, excessive and completely disproportionate to the services rendered in return therefore."

15. The Fund denies the allegations in Paragraph 15.

"16. Pursuant to § 36(b) of the Act, KFS has a fiduciary duty with respect to the receipt of compensation from the Fund. By virtue of the

foregoing, KFS has breached its fiduciary duty to the Fund."

16. The first sentence of Paragraph 16 is a legal conclusion which is not directed against the Fund and which the Fund is not required to answer. The Fund denies the allegations in the second sentence of Paragraph 16.

"17. No demand has been made by the plaintiff upon the Fund or its directors to institute or prosecute this action because no such demand is required under § 36(b) of the Act."

17. The Fund admits that no demand has been made by Kamen upon the Fund or its directors. The remaining allegation in Paragraph 17 is a legal conclusion which the Fund is not required to answer.

WHEREFORE, Defendant, CASH EQUIVALENT FUND, INC. prays that this Court enter judgment in its favor dismissing with prejudice all claims of Plaintiff, JILL S. KAMEN, and awarding said Defendant its costs including attorneys' fees in defending this action.

FIRST AFFIRMATIVE DEFENSE

The Complaint fails to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

Kamen has failed to state a cause of action on behalf of the Fund under § 20 (15 U.S.C. § 80a-20) because she did not make a demand on the Fund or its directors to initiate suit.

THIRD AFFIRMATIVE DEFENSE

Kamen has failed to state a cause of action under § 20 (15 U.S.C. § 80a-20) because no private cause of action exists under § 20 for the allegations in the Complaint.

CASH EQUIVALENT FUND, INC.

By /s/ Arthur J. McGivern
One Of Its Attorneys

Charles F. Custer
Arthur J. McGivern
Gwenda M. Burkhardt

Of Counsel:

VEDDER, PRICE, KAUFMAN & KAMMHOLZ
115 South LaSalle Street
Chicago, Illinois 60603
312/781-2200

Dated: July 2, 1985

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

| | | |
|----------------------------|---|----------------|
| JILL S. KAMEN, |) | |
| |) | |
| Plaintiff, |) | |
| |) | |
| v. |) | No. 85 C 4587 |
| |) | |
| KEMPER FINANCIAL SERVICES, |) | Judge Nordberg |
| INC. and CASH EQUIVALENT |) | |
| FUND, INC., |) | |
| |) | |
| Defendants. |) | |

ANSWER OF DEFENDANT
KEMPER FINANCIAL SERVICES, INC.

Defendant Kemper Financial Services, Inc. ("KFS"), by its attorneys, Jenner & Block, for its answer to plaintiff's complaint, the allegations of which appear below in brackets, states as follows:

[1. This Court has jurisdiction of this action under the Investment Company Act of 1940 as amended, 15 U.S.C. § 80a-1 et seq. (the "Act"), and in particular § 36 and § 44 thereof, 15 U.S.C. § 80a-35 and § 80a-43.]

ANSWER: Paragraph 1 is a legal conclusion which KFS is not required to answer.

[2. The cause of action arises under the Act and in particular under § 20 and § 36 thereof.]

ANSWER: KFS denies the allegations in Paragraph 2.

[3. Plaintiff is a shareholder of defendant Cash Equivalent Fund, Inc. (the "Fund") and has been a shareholder of the Fund at all times relevant herein. Plaintiff brings this action on behalf of the Fund.]

ANSWER: KFS admits that plaintiff has been a shareholder of the Money Market Portfolio of the Fund since December 31, 1981. KFS denies that plaintiff is authorized to bring this action on behalf of the Fund and, further answering, states that plaintiff has failed to make a demand on the Board of Directors of the Fund to file suit.

[4. The Fund is a diversified open-end investment company registered with the Securities and Exchange Commission under the Act. Its principal place of business is located at 120 South LaSalle Street, Chicago, Illinois 60603. It is the type of investment company commonly referred to as a money market fund.]

ANSWER: KFS admits the allegations in Paragraph 4.

[5. The Fund's investment objective is to seek the maximum current income consistent with stability of capital. The Fund invests in a range of short-term money market instruments which have maturities not exceeding one year. These instruments include obligations of the United States Government and its agencies and instrumentalities, certificates of deposit, bankers acceptances, fixed time deposits, commercial paper, and repurchase agreements. Although the Fund did not commence operations until March 16, 1979, its total assets as of April 23, 1985 were approximately \$4,683,000,000.]

ANSWER: KFS denies that the total assets of the Fund as of April 23, 1985 were approximately \$4,683,000,000 and, further answering, states that the total assets of the Fund as of April 23, 1985 were approximately \$5,172,000,000. KFS admits the remaining allegations in Paragraph 5.

[6. At all times relevant herein, defendant Kemper Financial Services, Inc. ("KFS") has acted as investment

adviser, manager, primary administrator and underwriter for the Fund.]

ANSWER: KFS admits the allegations in Paragraph 6.

[7. During all times relevant herein, KFS has received and continues to receive a monthly fee divided into two parts and paid under two separate agreements. Under an investment management agreement, the Fund pays KFS an investment management fee at the annual rate of .22 of 1% of the first \$500,000,000 of the combined average daily net assets of the portfolios KFS manages, .20 of 1% of the next \$500,000,000, .175 of 1% of the next \$1 billion, .16% of the next \$1 billion and .15 of 1% of average daily net assets of such portfolios over \$3 billion. Under an administration, shareholder services and distribution agreement ("administration agreement") the Fund pays KFS an annual fee, payable monthly, on a basis of .33% of the first \$500,000,000 of average daily net assets, .30% of the next \$500,000,000, .275% of the next \$1 billion, .265% of the next \$1 billion, and .25% of average daily net assets over \$3 billion.]

ANSWER: KFS denies that it receives "a monthly fee," but, further answering, admits that it receives two separate fees, each on a monthly basis. KFS admits the remaining allegations in Paragraph 7.

[8. Because of the tremendous growth in the size of the Fund, the fees paid and payable to KFS have increased enormously. Thus, for the fiscal year ended July 31, 1984, the Fund paid KFS nearly \$20,000,000 in fees. Of this amount, \$7,481,000 was paid under the investment management agreement and \$11,936,000 was paid under the administration agreement. KFS has entered into related services agreements with various firms and, during the 1984 fiscal year paid \$11,602,000 to such firms. Of that amount, \$2,817,000 was paid to broker-dealer firms affiliated with Kemper Corporation, of which KFS is a wholly owned subsidiary. At the present time, the Fund's

obligations to KFS under the agreements have increased with the size of the Fund and are running at a rate in excess of \$20,000,000 per year.]

ANSWER: KFS admits that for the fiscal year ended July 31, 1984, it received approximately \$7,481,000 in fees under the investment management agreement and approximately \$11,936,000 in fees under the administration, shareholder services and distribution agreement. KFS further admits that during fiscal 1984, KFS paid approximately \$11,602,000 of the \$11,936,000 to various firms with which KFS had entered into service agreements in order to obtain services for shareholders of the Fund. KFS further admits that of the \$11,602,000, approximately \$2,817,000 was paid to broker dealers affiliated with Kemper Corporation, of which KFS is a wholly owned subsidiary. KFS admits that since the fee is calculated as a percentage of Fund assets, the Fund's obligations to KFS under the agreements increase with increases in the size of the Fund.

KFS denies each and every remaining allegation in Paragraph 8.

[9. Unlike most other companies, the management of the assets of a money market fund, such as the Fund herein, does not require the detailed analysis of industries nor of complex industrial companies and the concomitant retention of a large staff of highly paid and sophisticated securities analysts. Indeed, the assets of the Fund, are and have been, invested in a relatively concentrated manner in fixed income obligations maturing in one year or less. In the ordinary course of operations, decisions to purchase are made on the same day that the funds are received.]

ANSWER: KFS admits that assets of the Fund are invested in fixed income obligations maturing in one year

or less and that, in the ordinary course of operations, decisions to purchase are made on the same day that the funds are received or shortly thereafter.

KFS denies each and every remaining allegation in Paragraph 9.

[10. Despite the huge growth in the size of the Fund, no change in the fee structure has been made since December 1, 1981 when, in spite of the economies of scale resulting from the Fund's enormous growth, the fees were increased by virtue of the adoption of the administration agreement.]

ANSWER: KFS admits that there has been no change in the fee structure since December 1, 1981. KFS further admits that in November 1981, the administration, shareholder services and distribution agreement was adopted pursuant to and in accordance with Rule 12b-1 as adopted by the Securities and Exchange Commission under the Act; that the Fund pays fees to KFS pursuant to the terms of the administration, shareholder services and distribution agreement; and, that all but a small portion of those fees are paid to various firms that provide services to the shareholders of the Fund. KFS further admits that the combined investment management and administration, shareholder services and distribution fee structure, expressed as a combined percentage of the Fund's net assets, is higher after December 1, 1981, than the investment management fee alone was prior to that date.

KFS denies each and every remaining allegation in paragraph 10.

[11. As a result of the tremendous increase in the assets of the Fund, the compensation paid and payable to

KFS has increased enormously and disproportionately to the services rendered by it.]

ANSWER: KFS denies the allegations in Paragraph 11.

[12. In addition to acting as investment manager to the Fund, KFS also acts as an investment manager to numerous other accounts and investment companies. Among those investment companies is Kemper Money Market Fund, Inc. ("MM"). MM, like the Fund, is a money market fund with the identical objective of obtaining maximum current income to the extent consistent with stability of principal. It is approximately the same size as the Fund, has approximately the same number of shareholders, and invests in the same types of securities as does the fund. The directors and many of the officers and other personnel servicing MM are the same as those performing services for the Fund. KFS is the investment adviser, manager, and underwriter for MM and supplies to MM substantially the same services that it supplies or causes to be supplied to the Fund. Yet, KFS exacts substantially greater fees from the Fund than it does from MM and many of its other clients. Thus, in the year ended July 31, 1984, the Fund's expenses were .72% of its average net assets, whereas those of MM were only .53%, and in every year since 1981 the expenses of the Fund have been significantly greater than those of MM. As a result, the Fund's yield for the year ended September 30, 1984 was approximately 21 basis points less than that of MM, so that the Fund's investment objective of obtaining maximum current income consistent with stability was effectively thwarted by KFS's exaction of exorbitant fees.]

ANSWER: KFS admits that it acts as investment manager to the Fund and other accounts and investment companies, including Kemper Money Market Fund, Inc. ("MM"), a money market fund whose objective of obtaining maximum current income to the extent consistent with stability of principal, is identical to that of the Fund.

and which invests in substantially the same types of securities as the Fund. KFS further admits that the directors and many of the officers and other personnel servicing MM are the same as those performing services for the Fund and that KFS is the investment adviser, manager and underwriter for MM. KFS further admits that for the year ended July 31, 1984, the ratio of expenses to average net assets was .72% for the Money Market Portfolio and .65% for the Government Securities Portfolio of the Fund and .53% for MM.

Further answering, KFS states that as of April 23, 1985, the total assets of the Fund were approximately \$5,172,000,000 and the total assets of MM were approximately \$4,736,000,000 and that as of April 30, 1985, the Fund had approximately 687,000 shareholders and MM had approximately 374,000 shareholders.

KFS denies each and every remaining allegation in Paragraph 12.

[13. On or about September 12, 1984, KFS caused to be distributed to the shareholders of the Fund a proxy statement for the annual meeting of shareholders on November 8, 1984. One of the principal purposes of the meeting which KFS was eager to accomplish was to obtain shareholder approval of the continuance of the investment management agreement between the Fund and KFS. The shareholders were asked to approve the agreement and were offered no alternative in the event of disapproval. As part of this solicitation, the proxy statement compared the services and fees offered and received by KFS from other investment companies. The proxy statement correctly described the services rendered to MM as being similar to those rendered to the Fund, but it misleadingly described the fees charged to MM as consisting of "a maximum fee of .50 of 1% of the first \$215,000,000 with lesser rates on additional assets." This

gave the false impression that the fees paid by MM were as high or higher than the fees paid by the Fund, whereas KFS knew that the fees received by it from MM were substantially lower than those received by it from the Fund, and that, in fact, for the year ended July 31, 1984 the fees received by KFS from MM aggregated only .28% of MM's average daily net assets. In disseminating the proxy statement to the shareholders of the Fund, KFS used the mails and means and instrumentalities of interstate commerce in violation of § 20 of the Act. The solicitation was successful, and KFS obtained shareholder approval of its management agreement with the Fund.]

ANSWER: KFS admits that pursuant to a proxy statement dated September 12, 1984, shareholders of the Fund were asked to approve the continuance of the investment management agreement between the Fund and KFS. KFS further admits that the proxy statement included the following language. "No consideration has been given to what action would be taken if shareholder approval of the agreement is not received." KFS admits that the proxy statement included information regarding rates of fees paid to KFS by other investment companies including MM. KFS further admits that the shareholders approved the continuance of the investment management agreement.

KFS denies each and every remaining allegation in paragraph 13.

[14. Because of the limited number, nature and variety of the Fund's investments, the investment decisions of the Fund can be made by a single person, or, at most, a handful of persons. The research and advisory activities of KFS are merely routine and administrative in nature, do not require any significant expertise or investment acumen, are performed (and were performed prior to the formation of the Fund) by KFS for other of its accounts,

and consist principally of purchasing and "turning over" money market instruments with a limited number of institutions. The incremental costs to KFS of performing these services for the Fund is minimal. In short, the investment advice provided by KFS is not worth the fees paid for that advice by the Fund and has not been worth the fees paid during the period covered by this complaint. Other advisers performed and have performed similar or superior services for lesser rates.]

ANSWER: KFS denies the allegations in Paragraph 14.

[15. The advisory and management fees paid by the Fund to KFS are exorbitant, unreasonable, excessive and completely disproportionate to the services rendered in return therefore.]

ANSWER: KFS denies the allegations in Paragraph 15.

[16. Pursuant to § 36(b) of the Act, KFS has a fiduciary duty with respect to the receipt of compensation from the Fund. By virtue of the foregoing, KFS has breached its fiduciary duty to the Fund.]

ANSWER: The first sentence of Paragraph 16 is a legal conclusion which KFS is not required to answer. KFS denies the allegations in the second sentence of Paragraph 16.

[17. No demand has been made by the plaintiff upon the Fund or its directors to institute or prosecute this action because no such demand is required under § 36(b) of the Act.]

ANSWER: KFS admits that no demand has been made by the plaintiff upon the Fund or its directors. The remaining allegation in Paragraph 17 is a legal conclusion which KFS is not required to answer.

WHEREFORE, defendant KFS denies that the plaintiff is entitled to judgment against KFS in any amount and prays that the complaint be dismissed with prejudice, and that KFS be awarded its costs and attorneys' fees.

FIRST AFFIRMATIVE DEFENSE

The complaint fails to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

Plaintiff has failed to state a cause of action on behalf of the Fund under § 20 (15 U.S.C. § 80a-20) because she did not make a demand on the Fund or its directors to initiate suit.

THIRD AFFIRMATIVE DEFENSE

Plaintiff has failed to state a cause of action under § 20 (15 U.S.C. § 80a-20) because no private cause of action exists under § 20 for the allegations in the complaint.

KEMPER FINANCIAL
SERVICES, INC.

By Joan M. Hall
One of its Attorneys

Joan M. Hall
Joel T. Pelz
JENNER & BLOCK
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350

Dated: July 2, 1985

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

| | | |
|----------------------------|---|----------------|
| JILL S. KAMEN, |) | |
| |) | |
| Plaintiff, |) | |
| |) | |
| v. |) | No. 85 C 4587 |
| |) | Judge Nordberg |
| KEMPER FINANCIAL SERVICES, |) | |
| INC. and CASH EQUIVALENT |) | |
| FUND, INC., |) | |
| |) | |
| Defendants. |) | |

DEFENDANT KEMPER FINANCIAL SERVICES,
INC.'s ANSWER TO SUPPLEMENTAL
AMENDED COMPLAINT

Defendant Kemper Financial Services, Inc. ("KFS"), by its attorneys, for its answer to plaintiff's supplemental amended complaint, the allegations of which appear below in brackets, states as follows:

[1. This Court has jurisdiction of this action under the Investment Company Act of 1940 as amended, 15 U.S.C. § 80a-1 et seq. (the "Act"), and in particular § 36 and § 44 thereof, 15 U.S.C. § 80a-35 and § 80a-43.]

ANSWER: The allegation contained in Paragraph 1 is a legal conclusion which KFS is not required to answer.

[2. The cause of action arises under the Act and in particular under § 20 and § 36 thereof.]

ANSWER: KFS denies the allegations in Paragraph 2.

[3. Plaintiff is a shareholder of defendant Cash Equivalent Fund, Inc. (the "Fund") and has been a shareholder of the Fund at all times relevant herein. Plaintiff brings this action on behalf of the Fund.]

ANSWER: KFS admits that plaintiff is a current shareholder in defendant Cash Equivalent Fund. KFS denies that plaintiff is authorized to bring this action on behalf of the Fund, and further answering states that the plaintiff is not an appropriate representative for the shareholders of the Fund and has failed to make a demand on the Board of Directors of the Fund to file suit.

[4. The Fund is a diversified open-end investment company registered with the Securities and Exchange Commission under the Act. Its principal place of business is located at 120 South LaSalle Street, Chicago, Illinois 60603. It is the type of investment company commonly referred to as a money market fund.]

ANSWER: KFS admits the allegations in Paragraph 4.

[5. (a). The Fund's investment objective is to seek the maximum current income consistent with stability of capital. The Fund invests in a range of short-term money market instruments which have maturities not exceeding one year. These instruments include obligations of the United States Government and its agencies and instrumentalities, certificates of deposit, bankers acceptances, fixed time deposits, commercial paper, and repurchase agreements. Although the Fund did not commence operations until March 16, 1979, its total assets as of April 23, 1985 were approximately \$4,683,000,000 in its money market portfolio and \$470,000,000 in its government securities portfolio.]

(b) As of November 26, 1986 the Fund's total assets consisted of \$5,390,000,000 in its money market portfolio and \$660,000,000 in its government securities portfolio.]

ANSWER: KFS denies that the total assets of the Fund, as of April 23, 1985, were approximately \$4,683,000,000 in its Money Market Portfolio and

\$470,000,000 in its Government Securities Portfolio and, further answering, states that the total net assets of the Fund, as of April 23, 1985, were approximately \$4,700,000,000 in its Money Market Portfolio and \$472,000,000 in its Government Securities Portfolio. KFS denies that, as of November 26, 1986, the Fund's assets in its Government Securities Portfolio were \$660,000,000 and, further answering, states that, as of November 26, 1986, the total net assets in the Government Securities Portfolio of the Fund were approximately \$666,000,000.

KFS admits the remaining allegations in Paragraph 5.

[6. At all times relevant herein, defendant Kemper Financial Services, Inc. ("KFS") has acted as investment adviser, manager, primary administrator and underwriter for the Fund.]

ANSWER: KFS admits the allegations in Paragraph 6.

[7. (a). During all times relevant herein, KFS has received and continues to receive a monthly fee divided into two parts and paid under two separate agreements. Under an investment management agreement, the Fund pays KFS an investment fee at the annual rate of .22 of 1% of the first \$500,000,000 of the combined average daily net assets of the portfolios KFS manages, .20 of 1% of the next \$500,000,000, .175 of 1% of the next \$1 billion, .16% of the next \$1 billion and .15 of 1% of average daily net assets of such portfolios over \$3 billion. Under an administration, shareholder services and distribution agreement ("administration agreement") the Fund pays KFS an annual fee, payable monthly, on a basis of .33% of the first \$500,000,000 of average daily net assets, .30% of the next \$500,000,000, .275% of the next \$1 billion, .265% of the next \$1 billion, and .25% of average daily net assets over \$3 billion.

(b). Effective November 4, 1986, KFS caused the administration agreement with the Fund to be amended to substantially increase the fees payable by the Fund to KFS. Under the amended agreement, the Fund pays to KFS administration fees at the annual rate of .38%. This increase required a change in the expense limitation which otherwise would have been exceeded by the enormous fee burden imposed upon the Fund.

(c). The administration agreement and its amendment were purportedly adopted pursuant to Rule 12b-1 promulgated by the Securities and Exchange Commission under the Act. Under that Rule, payments may be made by an investment company, such as the Fund, only if they are pursuant to a plan primarily intended to result in the sale of shares of such investment company. However, the administration agreement entered into between the Fund and KFS and the amendment thereto encompass payments which are not primarily intended to result in the sale of Fund shares. Indeed, the payments made pursuant to the administration agreement are not based upon sales of Fund shares, but rather upon the assets previously invested in the Fund by customers of KFS affiliates and other broker-dealers to whom the payments are made. Those payments are made without regard to whether sales are being effected by such entities. They are made primarily to enrich KFS, the KFS affiliates and the broker-dealers and are designed neither to promote the sale of Fund shares nor to benefit the Fund or its shareholders.]

ANSWER: With respect to subparagraph (a), KFS denies that it received "a monthly fee," but further answering admits that it receives two separate fees, each on a monthly basis. KFS admits the remaining allegations in subparagraph 7(a).

With respect to subparagraph (b), KFS admits that on November 4, 1986, the shareholders of the Fund approved an increase in the fees payable by the Fund to

KFS under the administration, shareholder services and distribution agreement and that, pursuant to this amendment, the Fund pays these fees to KFS at an annual rate of .38%. KFS denies that this increase was effective November 4, 1986 and, further answering, states that it was effective on December 1, 1986. KFS further admits that the shareholders also approved an amendment to the expense limitation which otherwise would have been exceeded as a result of the newly approved fees. KFS denies the remaining allegations in subparagraph 7(b).

With respect to subparagraph (c), KFS admits that the administration, shareholder services and distribution agreement and its amendment were adopted pursuant to Rule 12b-1 promulgated by the Securities and Exchange Commission. KFS further admits that payments made under the administration, shareholder services and distribution agreement are based upon assets invested in the Fund. KFS denies the remaining allegations in subparagraph 7(c).

[8. Because of the tremendous growth in the size of the Fund, the fees paid and payable to KFS have increased enormously. Thus, for the fiscal year ended July 31, 1984, the Fund paid KFS nearly \$20,000,000 in fees. Of this amount, \$7,481,000 was paid under the investment management agreement and \$11,936,000 was paid under the administration agreement. KFS has entered into related services agreements with various firms and, during the 1984 fiscal year, paid \$11,602,000 to such firms. Of that amount, \$2,817,000 was paid to broker-dealer firms affiliated with Kemper Corporation, of which KFS is a wholly owned subsidiary. At the present time, the Fund's obligations to KFS under the agreements have increased with the size of the Fund and are running at a rate in excess of \$33,000,000 per year. Under the amended administration agreement, firms affiliated with KFS will

receive approximately \$5,750,000 per year at the present size of the Fund.]

ANSWER: KFS admits that for the fiscal year ended July 31, 1984, it received approximately \$7,481,000 in fees under the investment management agreement and approximately \$11,936,000 in fees under the administration, shareholder services and distribution agreement. KFS further admits that, during fiscal 1984, KFS paid approximately \$11,602,000 of the \$11,936,000 to various firms with which KFS had entered into service agreements in order to obtain services for shareholders of the Fund. KFS further admits that of the \$11,602,000 approximately \$2,817,000 was paid to broker-dealers affiliated with Kemper Corporation, of which KFS is a wholly owned indirect subsidiary. KFS admits that, since the fee is calculated as a percentage of Fund assets, the Fund's obligations to KFS under the agreements increase with increases in the size of the Fund. KFS admits that under the amended administration, shareholder services and distribution agreement, firms affiliated with Kemper Corporation will receive approximately \$5,618,000 per year at the present size of the Fund.

KFS denies each and every remaining allegation in Paragraph 8.

[9. Unlike most other investment companies, the management of the assets of a money market fund, such as the Fund herein, does not require the detailed analysis of industries nor of complex industrial companies and the concomitant retention of a large staff of highly paid and sophisticated securities analysts. Indeed, the assets of the fund, are and have been, invested in a relatively concentrated manner in fixed income obligations maturing in one year or less. In the ordinary course of operations,

decisions to purchase are made on the same day that the funds are received.]

ANSWER: KFS admits that the assets of the Fund are invested in fixed income obligations maturing in one year or less and that, in the ordinary course of operations, decisions to purchase are made on the same day that the funds are received or shortly thereafter.

KFS denies each and every remaining allegation in Paragraph 9.

[10. Despite the huge growth in the size of the Fund, the only changes in the fee structure were made on December 1, 1981 and November 4, 1986 when, in spite of the economies of scale resulting from the Fund's enormous growth, the fees were increased by virtue of the adoption and amendment of the administration agreement.]

ANSWER: KFS admits that changes in the fee structure occurred on December 1, 1981 and November 4, 1986 (effective December 1, 1986). KFS further admits that in November 1981, the administration, shareholder services and distribution agreement was adopted pursuant to and in accordance with Rule 12b-1 as adopted by the Securities and Exchange Commission under the Act; that the Fund pays fees to KFS pursuant to the terms of the administration, shareholder services and distribution agreement; and that all but a small portion of those fees are paid to various firms that provide services to the shareholders to the Fund. KFS further admits that the combined fee structure for the investment management agreement and for the administration, shareholder services and distribution agreement, expressed as a combined percentage of the Fund's net assets, was higher after December 1, 1981, than the investment management

fee alone was prior to that date. KFS further admits that the combined fee structure is higher after the November 4, 1986 amendment (effective December 1, 1986), than it was prior to that amendment, which was approved by shareholder vote.

KFS denies each and every remaining allegation in Paragraph 10.

[11. As a result of the tremendous increase in the assets of the Fund, the compensation paid and payable to KFS has increased enormously and disproportionately to the services rendered by it.]

ANSWER: -KFS denies the allegations contained in Paragraph 11.

[12. In addition to acting as investment manager to the Fund, KFS also acts as an investment manager to numerous other accounts and investment companies. Among those investment companies is Kemper Money Market Fund, Inc. ("MM"). MM, like the Fund, is a money market fund with the identical objective of obtaining maximum current income to the extent consistent with stability of principal. It is approximately the same size as the Fund, has approximately the same number of shareholders, and invests in the same types of securities as does the Fund. The directors and many of the officers and other personnel servicing MM are the same as those performing services for the Fund. KFS is the investment adviser, manager, and underwriter for MM and supplies to MM substantially the same services that it supplies or causes to be supplied to the Fund. Yet, KFS exacts substantially greater fees from the Fund than it does from MM and many of its other clients. Thus, in the year ended July 31, 1984, the Fund's expenses were .72% of its average net assets, whereas those of MM were only .53%, and in every year since 1981 the expenses of the Fund have been significantly greater than those of MM. As a result,

the Fund's yield for the year ended September 30, 1984, was approximately 21 basis points less than that of MM, so that the Fund's investment objective of obtaining maximum current income consistent with stability was effectively thwarted by KFS's exaction of exorbitant fees.]

ANSWER: KFS admits that it acts as investment manager to the Fund and other accounts and investment companies, including Kemper Money Market Fund ("MM"), a money market fund whose objective is obtaining maximum current income to the extent consistent with stability of principal. KFS admits that MM's investment objective is identical to that of the Fund and that MM invests in substantially the same types of securities as the Fund. KFS further admits that the directors and many of the officers and other personnel servicing MM are the same as those performing services for the Fund and that KFS is the investment adviser, manager and underwriter for MM. KFS further admits that, for the year ended July 31, 1984, the ratio of expenses to average net assets was .72% for the Money Market Portfolio and .65% for the Government Securities Portfolio of the Fund and .53% for MM.

Further answering, KFS states that, as of April 23, 1985, the total assets of the Fund were approximately \$5,172,000,000 and the total assets of MM were approximately \$4,736,000,000, and that, as of May 31, 1985, the Fund had approximately 687,000 shareholders and MM had approximately 374,000 shareholders.

KFS denies each and every remaining allegation of Paragraph 12.

[13. On or about September 12, 1984, KFS caused to be distributed to the shareholders of the Fund a proxy

statement for the annual meeting of shareholders on November 8, 1984. One of the principal purposes of the meeting which KFS was eager to accomplish was to obtain shareholder approval of the continuance of the investment management agreement between the Fund and KFS. The shareholders were asked to approve the agreement and were offered no alternative in the event of disapproval. As part of this solicitation, the proxy statement compared the services and fees offered and received by KFS from other investment companies. The proxy statement correctly described the services rendered to MM as being similar to those rendered to the Fund, but it misleadingly described the fees charged to MM as consisting of "a maximum fee of .50 of 1% of the first \$215,000,000 with lesser rates on additional assets." This gave the false impression that the fees paid by MM were as high or higher than the fees paid by the Fund, whereas KFS knew that the fees received by it from MM were substantially lower than those received by it from the Fund, and that, in fact, for the year ended July 31, 1984 the fees received by KFS from MM aggregated only .28% of MM's average daily net assets. In disseminating the proxy statement to the shareholders of the Fund, KFS used the mails and means and instrumentalities of interstate commerce in violation of § 20 of the Act. The solicitation was successful, and KFS obtained shareholder approval of its management agreement with the Fund, to the damage of the Fund and its shareholders.]

ANSWER: KFS admits that, pursuant to a proxy statement dated September 12, 1984, shareholders of the Fund were asked to approve the continuance of the investment management agreement between the Fund and KFS. KFS further admits that the proxy statement included the following language: "No consideration has been given to what action would be taken if shareholder approval of the agreement is not received." KFS admits that the proxy statement included information regarding

rates and fees paid to KFS by other investment companies, including MM. KFS further admits that the shareholders approved the continuance of the investment management agreement.

KFS denies each and every remaining allegation in Paragraph 13.

[14. Because of the limited number, nature and variety of the Fund's investments, the investment decisions of the Fund can be made by a single person, or, at most, a handful of persons. The research and advisory activities of KFS are merely routine and administrative in nature, do not require any significant expertise or investment acumen, are performed (and were performed prior to the formation of the Fund) by KFS for other of its accounts, and consist principally of purchasing and "turning over" money market instruments with a limited number of institutions. The incremental costs to KFS of performing these services for the Fund is minimal. In short, the investment advice provided by KFS is not worth the fees paid for that advice by the Fund and has not been worth the fees paid during the period covered by this complaint. Other advisers performed and have performed similar or superior services for lesser rates.]

ANSWER: KFS denies the allegations in Paragraph 14.

[15. The advisory and management fees paid by the Fund to KFS are exorbitant, unreasonable, excessive and completely disproportionate to the services rendered in return therefor.]

ANSWER: KFS denies the allegations in Paragraph 15.

[16. Pursuant to § 36(b) of the Act, KFS has a fiduciary duty with respect to the receipt of compensation from the Fund. By virtue of the foregoing, KFS has breached its fiduciary duty to the Fund.]

ANSWER: The first sentence of Paragraph 16 is a legal conclusion which KFS is not required to answer. KFS denies the allegations in the second sentence of Paragraph 16.

[17. No demand has been made by the plaintiff upon the Fund or its directors to institute or prosecute this action for the following reasons:

(a) With respect to the claims asserted under § 38(b) of the Act, no such demand is required;

(b) The board of directors of the Fund consists of ten members. Of those, three are "interested" as defined by the Act; that is, they have a personal financial interest in KFS. In addition, the president of the Fund, John Hawkinson, was formerly president of KFS and is a stockholder of Kemper Corporation, KFS's parent. Furthermore, the so-called "non-interested" directors currently receive aggregate remuneration of approximately \$300,000 a year for serving as directors of the Fund and of all the other funds in the Kemper group. They are dependent upon and subservient to KFS and Kemper Corporation, its parent;

(c) The proxy statement referred to in paragraph 13 above stated: "The accompanying proxy is solicited by the Board of Directors of the Fund . . .", and indeed, the directors did vote, without dissent, to distribute the proxy statement to Fund shareholders. Any suit, such as the instant suit, brought to establish liability for the material false statements contained in that proxy statement would, if successful, tend to establish culpability and liability on the part of all the directors of the Fund;

(d) Requiring the plaintiff to make a demand on the Fund or its directors to institute or prosecute this action would be futile. It would be tantamount to asking the directors to sue themselves. Moreover, were the directors to accept such an invitation and institute an action, the prosecution of the action would be in hostile hands inimical to its success;

(e) All of the directors, and the Fund itself, as well as its personnel and policies, are under the control of KFS and Kemper Corporation, its parent;

(f) In responding to the original complaint, the Fund, both in its answer and motion to dismiss, has sought the dismissal of the complaint on substantive grounds;

(g) Under all of the circumstances present in this case, application of a demand requirement would be inconsistent with the federal policy underlying § 20 of the Investment Company Act.]

ANSWER: KFS admits that no demand has been made by the plaintiff upon the Fund or its directors.

KFS denies that the Fund and its directors are under the control of KFS and denies that there is no demand requirement.

The remaining allegations in Paragraph 17 are either legal conclusions or are directed toward parties other than KFS, and therefore KFS is not required to provide any answer.

WHEREFORE, defendant KFS denies that the plaintiff is entitled to judgment against KFS in any amount and prays that the supplemental amended complaint be dismissed with prejudice, and that KFS be awarded its costs and attorneys' fees. KFS further denies that plaintiff is entitled to a trial by jury.

FIRST AFFIRMATIVE DEFENSE

The supplemental amended complaint fails to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

Plaintiff has failed to state a cause of action on behalf of the Fund under Section 20 (15 U.S.C. § 80a-20) because she did not make a demand on the Fund or its directors to initiate suit.

THIRD AFFIRMATIVE DEFENSE

Plaintiff has failed to state a cause of action under Section 20 (15 U.S.C. § 80a-20) because no private cause of action exists under Section 20 for the allegations in the complaint.

FOURTH AFFIRMATIVE DEFENSE

Plaintiff is not a fair and adequate representative of the shareholders of the Fund and therefore cannot maintain this action.

KEMPER FINANCIAL
SERVICES, INC.

By Joel T. Pelz
One of Its Attorneys

Joan M. Hall
Joel T. Pelz
JENNER & BLOCK
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350

DATED: December 29, 1986

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

| | | |
|-----------------------|---|----------------|
| JILL S. KAMEN, |) | |
| |) | |
| Plaintiff, |) | |
| |) | |
| v. |) | No. 85 C 4587 |
| |) | Judge Nordberg |
| KEMPER FINANCIAL |) | |
| SERVICES, INC. and |) | |
| CASH EQUIVALENT FUND, |) | |
| |) | |
| Defendants. |) | |

ANSWER OF DEFENDANT, CASH EQUIVALENT
FUND TO SUPPLEMENTAL
AMENDED COMPLAINT

Defendant CASH EQUIVALENT FUND ("the Fund"), by its attorneys, for its answer to plaintiff's supplemental amended complaint, states as follows:

1. This Court has jurisdiction of this action under the Investment Company Act of 1940 as amended, 15 U.S.C. § 80a-1 et seq. (the "Act"), and in particular § 36 and § 44 thereof, 15 U.S.C. § 80a-35 and § 80a-43.

ANSWER: 1. The allegation contained in Paragraph 1 is a legal conclusion which the Fund is not required to answer.

2. The cause of action arises under the Act and in particular under § 20 and § 36 thereof.

ANSWER: 2. The Fund denies the allegations of Paragraph 2.

3. Plaintiff is a shareholder of defendant Cash Equivalent Fund, (the "Fund") and has been a shareholder of the Fund at all times relevant herein. Plaintiff brings this action on behalf of the Fund.

ANSWER: 3. The Fund admits that plaintiff is a current shareholder in defendant Cash Equivalent Fund, a Massachusetts business trust. The Fund denies that plaintiff is authorized to bring this action on behalf of the Fund, and further answering, states that the plaintiff is not an appropriate representative of the shareholders of the Fund and has failed to make a demand on the Fund's Board of Trustees to file this suit.

4. The Fund is a diversified open-end investment company registered with the Securities and Exchange Commission under the Act. Its principal place of business is located at 120 South LaSalle Street, Chicago, Illinois 60603. It is the type of investment company commonly referred to as a money market fund.

ANSWER: 4. The Fund admits the allegations of Paragraph 4.

5. (a) The Fund's investment objective is to seek the maximum current income consistent with stability of capital. The Fund invests in a range of short-term money market instruments which have maturities not exceeding one year. These instruments include obligations of the United States Government and its agencies and instrumentalities, certificates of deposit, bankers acceptances, fixed time deposits, commercial paper, and repurchase agreements. Although the Fund did not commence operations until March 16, 1979, its total assets as of April 23, 1985 were approximately \$4,683,000,000 in its money market portfolio and \$470,000,000 in its government securities portfolio.

(b) As of November 26, 1986 the Fund's total assets consisted of \$5,390,000,000 in its money market portfolio and \$660,000,000 in its government securities portfolio.

ANSWER: 5. The Fund denies that the total assets of the Fund, as of April 23, 1985, were approximately

\$4,683,000,000 in its Money Market Portfolio and \$470,000,000 in its Government Securities Portfolio and, further answering, states that the total net assets of the Fund, as of April 23, 1985, were approximately \$4,700,000,000 in its Money Market Portfolio and \$472,000,000 in its Government Securities Portfolio. The Fund denies that, as of November 26, 1986, the Fund's assets in its Government Securities Portfolio were \$660,000,000 and, further answering, states that, as of November 26, 1986, the total net assets in the Government Securities Portfolio of the Fund were approximately \$666,000,000. The Fund admits the remaining allegations of Paragraph 5.

6. At all times relevant herein, defendant Kemper Financial Services, Inc. ("KFS") has acted as investment adviser, manager, primary administrator and underwriter for the Fund.

ANSWER: 6. The Fund admits the allegations of Paragraph 6.

7. (a) During all times relevant herein, KFS has received and continues to receive a monthly fee divided into two parts and paid under two separate agreements. Under an investment management agreement, the Fund pays KFS an investment management fee at the annual rate of .22 of 1% of the first \$500,000,000 of the combined average daily net assets of the portfolios KFS manages, .20 of 1% of the next \$500,000,000, .175 of 1% of the next \$1 billion, .16% of the next \$1 billion and .15 of 1% of average daily net assets of such portfolios over \$3 billion. Under an administration, shareholder services and distribution agreement ("administration agreement") the Fund pays KFS an annual fee, payable monthly, on a basis of .33% of the first \$500,000,000 of average daily net assets, .30% of the next \$500,000,000, .275% of the next \$1 billion,

.265% of the next \$1 billion, and .25% of average daily net assets over \$3 billion.

(b) Effective November 4, 1986, KFS caused the administration agreement with the Fund to be amended to substantially increase the fees payable by the Fund to KFS. Under the amended agreement, the Fund pays to KFS administration fees at the annual rate of .38%. This increase required a change in the expense limitation which otherwise would have been exceeded by the enormous fee burden imposed upon the Fund.

(c) The administration agreement and its amendment were purportedly adopted pursuant to Rule 12b-1 promulgated by the Securities and Exchange Commission under the Act. Under that Rule, payments may be made by an investment company, such as the Fund, only if they are pursuant to a plan primarily intended to result in the sale of shares of such investment company. However, the administration agreement entered into between the Fund and KFS and the amendment thereto encompass payments which are not primarily intended to result in the sale of Fund shares. Indeed, the payments made pursuant to the administration agreement are not based upon sales of Fund shares, but rather upon the assets previously invested in the Fund by customers of KFS affiliates and other broker-dealers to whom the payments are made. Those payments are made without regard to whether sales are being effected by such entities. They are made primarily to enrich KFS, the KFS affiliates and the broker-dealers and are designed neither to promote the sale of Fund shares nor to benefit the Fund or its shareholders.

ANSWER: 7. With respect to subparagraph 7(a), the Fund denies that it paid KFS "a monthly fee," but, further answering, states that it pays KFS two separate fees, each on a monthly basis. The Fund admits the remaining allegations of subparagraph 7(a).

With respect to subparagraph 7(b), the Fund admits that on November 4, 1986, the shareholders of the Fund

approved an increase in the fees payable by the Fund to KFS under the administration, shareholder services and distribution agreement and that, pursuant to this amendment, the Fund pays these fees to KFS at an annual rate of .38%. The Fund denies that this increase was effective November 4, 1986 and, further answering, states rather that it became effective on December 1, 1986. The Fund further admits that its shareholders also approved an amendment to the expense limitation which otherwise would have been exceeded as a result of the newly approved fees. The Fund denies the remaining allegations of subparagraph 7(b).

With respect to subparagraph 7(c), the Fund admits that the administration agreement and its amendment were adopted pursuant to Rule 12b-1 promulgated by the Securities and Exchange Commission. The Fund further admits that payments made under the administration agreement are based upon assets invested in the Fund. The Fund denies the remaining allegations of subparagraph 7(c).

8. Because of the tremendous growth in the size of the Fund, the fees paid and payable to KFS have increased enormously. Thus, for the fiscal year ended July 31, 1984, the Fund paid KFS nearly \$20,000,000 in fees. Of this amount, \$7,481,000 was paid under the investment management agreement and \$11,936,000 was paid under the administration agreement. KFS has entered into related services agreements with various firms and, during the 1984 fiscal year, paid \$11,602,000 to such firms. Of that amount, \$2,817,000 was paid to broker-dealer firms affiliated with Kemper Corporation, of which KFS is a wholly owned subsidiary. At the present time, the Fund's obligations to KFS under the agreements have increased with the size of the Fund and are running at a rate in excess of \$33,000,000 per year. Under the amended

administration agreement, firms affiliated with KFS will receive approximately \$5,750,000 per year at the present size of the Fund.

ANSWER: 8. The Fund admits that for the fiscal year ended July 31, 1984, it paid KFS approximately \$7,481,000 in fees under the investment management agreement and approximately \$11,936,000 in fees under the administration, shareholder services and distribution agreement. The Fund further admits that, during fiscal 1984, KFS paid approximately \$11,602,000 of the \$11,936,000 to various firms with which KFS had entered into service agreements in order to obtain services for shareholders of the Fund. The Fund further admits that of the \$11,602,000, approximately \$2,817,000 was paid to broker-dealers affiliated with Kemper Corporation, of which KFS is a wholly owned subsidiary. The Fund admits that, since the fee is calculated as a percentage of Fund assets, the Fund's obligations to KFS under the agreements increase with increases in the size of the Fund. The Fund admits that under the amended administration, shareholder services and distribution agreement, firms affiliated with Kemper Corporation will receive approximately \$5,618,000 per year at the present size of the Fund.

The Fund denies each and every remaining allegation of Paragraph 8.

9. Unlike most other investment companies, the management of the assets of a money market fund, such as the Fund herein, does not require the detailed analysis of industries nor of complex industrial companies and the concomitant retention of a large staff of highly paid and sophisticated securities analysts. Indeed, the assets of the

fund, are and have been, invested in a relatively concentrated manner in fixed income obligations maturing in one year or less. In the ordinary course of operations, decisions to purchase are made on the same day that the funds are received.

ANSWER: 9. The Fund admits that the assets of the Fund are invested in fixed income obligations maturing in one year or less and that, in the ordinary course of operations, decisions to purchase are made on the same day that the funds are received or shortly thereafter.

The Fund denies each and every remaining allegation of Paragraph 9.

10. Despite the huge growth in the size of the Fund, the only changes in the fee structure were made on December 1, 1981 and November 4, 1986 when, in spite of the economies of scale resulting from the Fund's enormous growth, the fees were increased by virtue of the adoption and amendment of the administration agreement.

ANSWER: 10. The Fund admits that the only changes in the fee structure occurred on December 1, 1981 and November 4, 1986. The Fund further admits that in November 1981, the administration, shareholder services and distribution agreement was adopted pursuant to and in accordance with Rule 12b-1 as adopted by the Securities and Exchange Commission under the Act; that the Fund pays fees to KFS pursuant to the terms of the administration, shareholder services and distribution agreement; and that all but a small portion of those fees are paid to various firms that provide services to the shareholders to the Fund. The Fund further admits that the combined investment management and administration, shareholder services and distribution agreements

fee structure, expressed as a combined percentage of the Fund's net assets, was higher after December 1, 1981 than the investment management fee alone was prior to that date. The Fund further admits that the combined investment management and administration, shareholder services and distribution fee structure was higher after the November 4, 1986 changes in the fee structure than it was prior to that date.

The Fund denies each and every remaining allegation of Paragraph 10.

11. As a result of the tremendous increase in the assets of the Fund, the compensation paid and payable to KFS has increased enormously and disproportionately to the services rendered by it.

ANSWER: 11. The Fund denies the allegations of Paragraph 11.

12. In addition to acting as investment manager to the Fund, KFS also acts as an investment manager to numerous other accounts and investment companies. Among those investment companies is Kemper Money Market Fund, Inc. ("MM"). MM, like the Fund, is a money market fund with the identical objective of obtaining maximum current income to the extent consistent with stability of principal. It is approximately the same size as the Fund, has approximately the same number of shareholders, and invests in the same types of securities as does the Fund. The directors and many of the officers and other personnel servicing MM are the same as those performing services for the Fund. KFS is the investment adviser, manager, and underwriter for MM and supplies to MM substantially the same services that it supplies or causes to be supplied to the Fund. Yet, KFS exacts substantially greater fees from the Fund than it does from MM and many of its other clients. Thus, in the year ended July 31, 1984, the Fund's expenses were .72% of its average net assets, whereas those of MM were only .53%, and

in every year since 1981 the expenses of the Fund have been significantly greater than those of MM. As a result, the Fund's yield for the year ended September 30, 1984, was approximately 21 basis points less than that of MM, so that the Fund's investment objective of obtaining maximum current income consistent with stability was effectively thwarted by KFS's exaction of exorbitant fees.

ANSWER: 12. The Fund admits that KFS acts as investment manager to the Fund and other accounts and investment companies, including Kemper Money Market Fund ("MM"). The Fund further admits that MM is a money market fund whose objective of obtaining maximum current income to the extent consistent with stability of principal is the same as the Fund, and which invests in substantially the same types of securities as the Fund. The Fund further admits that the directors and many of the officers and other personnel servicing MM are the same as those performing services for the Fund and that KFS is the investment adviser, manager and underwriter for MM. The Fund further admits that, for the year ended July 31, 1984, the ratio of expenses to average net assets was .72% for the Money Market Portfolio and .65% for the Government Securities Portfolio of the Fund.

Further answering, the Fund states that, as of April 23, 1985, the total assets of the Fund were approximately \$5,172,000,000, and that, as of May 31, 1985, the Fund had approximately 687,000 shareholders.

The Fund denies each and every remaining allegation of Paragraph 12.

13. On or about September 12, 1984, KFS caused to be distributed to the shareholders of the Fund a proxy statement for the annual meeting of shareholders on

November 8, 1984. One of the principal purposes of the meeting which KFS was eager to accomplish was to obtain shareholder approval of the continuance of the investment management agreement between the Fund and KFS. The shareholders were asked to approve the agreement and were offered no alternative in the event of disapproval. As part of this solicitation, the proxy statement compared the services and fees offered and received by KFS from other investment companies. The proxy statement correctly described the services rendered to MM as being similar to those rendered to the Fund, but it misleadingly described the fees charged to MM as consisting of "a maximum fee of .50 of 1% of the first \$215,000,000 with lesser rates on additional assets." This gave the false impression that the fees paid by MM were as high or higher than the fees paid by the Fund, whereas KFS knew that the fees received by it from MM were substantially lower than those received by it from the Fund, and that, in fact, for the year ended July 31, 1984 the fees received by KFS from MM aggregated only .28% of MM's average daily net assets. In disseminating the proxy statement to the shareholders of the Fund, KFS used the mails and means and instrumentalities of interstate commerce in violation of § 20 of the Act. The solicitation was successful, and KFS obtained shareholder approval of its management agreement with the Fund, to the damage of the Fund and its shareholders.

ANSWER: 13. The Fund admits that pursuant to a proxy statement dated September 12, 1984, shareholders of the Fund were asked to approve the continuation of the investment management agreement between the Fund and KFS. The Fund further admits that the proxy statement included the following language: "No consideration has been given to what action would be taken if shareholder approval of the agreement is not received." The

Fund admits that the proxy statement included information regarding rates and fees paid to KFS by other investment companies, including MM. KFS further admits that the shareholders approved the continuation of the investment management agreement.

The Fund denies each and every remaining allegation of Paragraph 13.

14. Because of the limited number, nature and variety of the Fund's investments, the investment decisions of the Fund can be made by a single person, or, at most, a handful of persons. The research and advisory activities of KFS are merely routine and administrative in nature, do not require any significant expertise or investment acumen, are performed (and were performed prior to the formation of the Fund) by KFS for other of its accounts, and consist principally of purchasing and "turning over" money market instruments with a limited number of institutions. The incremental costs to KFS of performing these services for the Fund is minimal. In short, the investment advice provided by KFS is not worth the fees paid for that advice by the Fund and has not been worth the fees paid during the period covered by this Complaint. Other advisers performed and have performed similar or superior services for lesser rates.

ANSWER: 14. The Fund denies the allegations of Paragraph 14.

15. The advisory and management fees paid by the Fund to KFS are exorbitant, unreasonable, excessive and completely disproportionate to the services rendered in return therefor.

ANSWER: 15. The Fund denies the allegations of Paragraph 15.

16. Pursuant to § 36(b) of the Act, KFS has a fiduciary duty with respect to the receipt of compensation from

the Fund. By virtue of the foregoing, KFS has breached its fiduciary duty to the Fund.

ANSWER: 16. The first sentence of Paragraph 16 is a legal conclusion to which answer is not required. The Fund denies the allegations in the second sentence of Paragraph 16.

17. No demand has been made by the plaintiff upon the Fund or its directors to institute or prosecute this action for the following reasons:

(a) With respect to the claims asserted under § 36(b) of the Act, no such demand is required;

(b) The board of directors of the Fund consists of ten members. Of those, three are "interested" as defined by the Act; that is, they have a personal financial interest in KFS. In addition, the president of the Fund, John Hawkinson, was formerly president of KFS and is a stockholder of Kemper Corporation, KFS's parent. Furthermore, the so-called "non-interested" directors currently receive aggregate remuneration of approximately \$300,000 a year for serving as directors of the Fund and of all the other funds in the Kemper group. They are dependent upon and subservient to KFS and Kemper Corporation, its parent;

(c) The proxy statement referred to in paragraph 13 above stated: "The accompanying proxy is solicited by the Board of Directors of the Fund . . .", and indeed, the directors did vote, without dissent, to distribute the proxy statement to Fund shareholders. Any suit, such as the instant suit, brought to establish liability for the material false statements contained in that proxy statement would, if successful, tend to establish culpability and liability on the part of all the directors of the Fund;

(d) Requiring the plaintiff to make a demand on the Fund or its directors to institute or prosecute this action would be futile. It would be tantamount to asking the directors to sue themselves. Moreover, were the directors

to accept such an invitation and institute an action, the prosecution of the action would be in hostile hands inimical to its success;

(e) All of the directors, and the Fund itself, as well as its personnel and policies, are under the control of KFS and Kemper Corporation, its parent;

(f) In responding to the original complaint, the Fund, both in its answer and motion to dismiss, has sought the dismissal of the complaint on substantive grounds;

(g) Under all of the circumstances present in this case, application of a demand requirement would be inconsistent with the federal policy underlying § 20 of the Investment Company Act.

ANSWER: 17. The Fund admits that no demand has been made by plaintiff upon the Fund or its trustees to institute this action. Further answering, the Fund states that the allegations contained in subparagraphs 17(a), (d), (e) and (g) are but statements of legal or factual conclusion, to which answer by the Fund is not required.

With respect to subparagraph 17(b), the Fund admits that three (3) of its trustees are "interested" as defined by the Act, admits that "non-interested" trustees are remunerated for their services as trustees of the Fund, admits that John Hawkinson is a stockholder of Kemper Corporation and denies the remaining allegations of subparagraph 17(b).

With respect to subparagraph 17(c), the Fund admits that the proxy statement therein described stated "The accompanying proxy is solicited by the Board of Directors of the Fund . . ." and that the directors voted to distribute the proxy statement to the Fund shareholders. The

remaining allegations of subparagraph 17(c) are conclusions to which no answer is required, and none is made.

With respect to subparagraph 17(f), the Fund admits it seeks dismissal of these proceedings on substantive grounds.

WHEREFORE, defendant CASH EQUIVALENT FUND denies that the plaintiff is entitled to judgment against it in any amount and prays that the supplemental amended complaint be dismissed with prejudice, and that defendant be awarded its costs and attorneys' fees. Defendant further denies that plaintiff is entitled to a trial by jury.

FIRST AFFIRMATIVE DEFENSE

The supplemental amended complaint fails to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

Plaintiff has failed to state a cause of action on behalf of the Fund under Section 20 of the Investment Company Act of 1940, as amended (15 U.S.C. § 80a-20) because she did not make a demand on the Fund or its directors to initiate suit.

THIRD AFFIRMATIVE DEFENSE

Plaintiff has failed to state a cause of action under Section 20 of the Investment Company Act of 1940, as amended (15 U.S.C. § 80a-20) because no private cause of

action exists under said Section 20 for the allegations in the complaint.

FOURTH AFFIRMATIVE DEFENSE

Plaintiff is not a fair, adequate or proper representative of the shareholders of the Fund and therefore cannot maintain this action.

CASH EQUIVALENT FUND

BY: Martin M. Ruken
One of Its Attorneys

Charles F. Custer
Martin M. Ruken
Vedder, Price, Kaufman & Kammholz
115 S. LaSalle Street
Chicago, IL 60603
312/781-2200

DATED: December 30, 1986

PLAINTIFF'S MOTION FOR RECONSIDERATION DATED FEBRUARY 11, 1987 WITH ATTACHED EXHIBITS

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
ILLINOIS EASTERN DIVISION

| | | |
|----------------------------|---|----------------|
| JILL S. KAMEN, |) | |
| |) | Case No. |
| Plaintiff, |) | 85 C 4587 |
| |) | |
| v. |) | |
| KEMPER FINANCIAL SERVICES, |) | Judge Nordberg |
| INC., and CASH EQUIVALENT |) | |
| FUND, INC., |) | |
| |) | |
| Defendants. |) | |

NOTICE OF FILING

| | |
|---------------------|--------------------------|
| TO: Joan Hall, Esq. | Arthur J. McGivern, Esq. |
| Jenner & Block | Vedder, Price, Kaufman & |
| One IBM Plaza, | Kammholz |
| 44th Floor | 115 South LaSalle Street |
| Chicago, Illinois | Suite 3000 |
| 60611 | Chicago, Illinois 60603 |

PLEASE TAKE NOTICE that on February 11, 1987 we will file with the Clerk of the above Court: Plaintiff's Motion for Reconsideration and Memorandum in Support of Motion for Reconsideration. A copy of the aforementioned documents are attached hereto.

DATED: February 11, 1987

JILL KAMEN, Plaintiff

BY: /s/ Clifford E. Yuknis
One of Her Attorneys

444 North Michigan Avenue
Suite 2300
Chicago, Illinois 60611
(312) 527-4000

OF COUNSEL:

Joel J. Sprayregen
Clifford E. Yuknis
Shefsky, Saitlin & Froelich, Ltd.

Richard M. Meyer
Milberg Weiss Bershad Specthrie & Lerach
One Pennsylvania Plaza
New York, New York 10119-0165
(212) 594-5300

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
ILLINOIS EASTERN DIVISION

| | | |
|----------------------------|---|----------------|
| JILL S. KAMEN, |) | |
| |) | |
| Plaintiff, |) | Case No. |
| |) | 85 C 4587 |
| v. |) | |
| |) | Judge Nordberg |
| KEMPER FINANCIAL SERVICES, |) | |
| INC., and CASH EQUIVALENT |) | |
| FUND, INC., |) | |
| |) | |
| Defendants. |) | |

PLAINTIFF'S MOTION FOR RECONSIDERATION

NOW COMES plaintiff, Jill S. Kamen, by her attorneys, and moves pursuant to Rule 59 of the Federal Rules of Civil Procedure for the Court to reconsider the February 2, 1987 memorandum opinion and order dismissing plaintiff's Section 20(a) claim and granting defendants' Motion to strike plaintiff's jury demand. In support of this motion, plaintiff states as follows:

1. Plaintiff is filing herewith the attached Memorandum in support of this Motion.

2. With regard to the dismissal of the proxy fraud claim under Section 20(a) of the Investment Company Act, the purpose of this motion is to point out that the allegations of refusal to sue are borne out by the testimony of the disinterested directors. Attached to the memorandum which is being filed in support of this motion are pages from the transcripts of deposition testimony of disinterested directors of Cash Equivalent Fund. It is clear that a majority of the Board of the Cash Equivalent Fund would not have prosecuted the claims asserted in the Complaint.

2. With regard to this Court's granting the defendants' motion to strike the Plaintiff's jury demand, the Memorandum points out that since the First Circuit's decision in *Dairy Queen*, the Supreme Court has leaned in the opposite direction. *Curtis v. Loether*, 405 U.S. 189, 196 (1974).

WHEREFORE, plaintiff prays that the Court (i) reconsider its February 2, 1987 memorandum opinion and order, (2) vacate its February 2, 1987 order, (3) deny the defendants' motion to dismiss the proxy fraud claim and strike the jury demand, and (4) grant plaintiff such other relief it considers proper.

DATED: February 11, 1987

JILL KAMEN, Plaintiff

BY: /s/ Clifford E Yuknis
One of Her Attorneys

444 North Michigan Avenue
Suite 2300
Chicago, Illinois 60611
(312) 527-4000

OF COUNSEL:

Joel J. Sprayregen
Clifford E. Yuknis
Shefsky, Saitlin & Froelich, Ltd.

Richard M. Meyer
Milberg Weiss Bershad Specthrie & Lerach
One Pennsylvania Plaza
New York, New York 10119-0165
(212) 594-5300

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

| | | |
|----------------------------|---|---------------|
| JILL S. KAMEN, |) | |
| |) | No. 85 C 4587 |
| Plaintiff, |) | |
| |) | |
| -vs- |) | |
| |) | |
| KEMPER FINANCIAL SERVICES, |) | |
| INC., AND CASH EQUIVALENT |) | |
| FUND, |) | |
| |) | |
| Defendants. |) | |

The deposition of THOMAS L. MARTIN, called by the Defendant Kemper Financial Services, Inc. for examination, taken pursuant to the Federal Rules of Civil Procedure of the United States District courts pertaining to the taking of depositions, taken before MARY KAY BELCOLORE, a Notary Public within and for the County of Du Page, State of Illinois, and a Certified Shorthand Reporter of said state, at Suite 4300, One IBM Plaza,

Chicago, Illinois, on the 28th day of October, A.D. 1986, at 9:30 a.m.

* * *

[p. 61] And any such statement coming to us or recommendation to us would be seriously considered.

And I know that that is true of this Board.

So the answer is, if it was in the opinion of the Board justified, I can't see that the Board would have any reason not to.

Q. Well, the Board did consider the complaint, did it not?

A. Yes.

Q. And did it authorize its counsel to take position in the litigation?

A. Yes.

Q. What position did it authorize its counsel to take?

A. To support the action of the Board, that the Board concluded that its recommendation on the fee structure was the correct one.

Q. And so that the Board decided that the funds should not press a claim against KFS?

MS. HALL: That is not what he has testified to.

MR. MEYER: I'm asking that. That is a new question.

BY THE WITNESS:

A. We effectively decided that the complaint [p. 62] of the stockholder was unjustified.

MR. MEYER: I have no further questions at this point.

MS. HALL: I have no questions.

MR. RUKEN: None.

MS. HALL: We are reading and signing.

FURTHER DEPONENT SAITH NOT.

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF
ILLINOIS EASTERN DIVISION

| | | |
|----------------------------|---|---------------|
| JILL S. KAMEN, |) | |
| |) | |
| Plaintiff, |) | No. 85 C 4587 |
| |) | |
| v. |) | |
| |) | |
| KEMPER FINANCIAL SERVICES, |) | |
| INC., and CASH EQUIVALENT |) | |
| FUND, INC., |) | |
| |) | |
| Defendants. |) | |

The deposition of ROBERT BUTLER HOFFMAN, called by the Plaintiff for examination, taken pursuant to the Federal Rules of Civil Procedure of the United States District Courts pertaining to the taking of depositions, taken before SHARYN A. EVERMAN, a Notary Public

within and for the County of Cook, State of Illinois, and a Certified Shorthand Reporter of said state, at Suite 4400, One IBM Plaza, Chicago, Illinois, on the 4th day of November, A.D. 1986, at 9:30 a.m.

* * *

[p. 84] doesn't mean that one wasn't made.

Q. Was any such statement made at any time subsequent to 1981 that you can remember?

A. No, not that I can remember.

Q. I take if from everything that you have said that you believe that the present fees, both the management fees and the 12b-1 plan as proposed and as existing, are appropriate?

A. I do.

Q. And I take it you also believe that the proxy material that has been used to solicit shareholder votes has fully reflected the necessary information?

A. I do.

Q. So that were you asked to commence an action against KFS with respect to the fees or the proxy material, you would not do so, is that correct?

MS. HALL: I object to the hypothetical nature of the question, but the witness may answer subject to the objection.

Would you read the question again?

(WHEREUPON, the record was read by the reporter as requested.)

BY THE WITNESS:

[p. 85] A. Were I to feel that way, which I do not, I would have asked that my vote be shown as a dissenting vote to what is in the minutes. And I - is that clear?

BY MR. MEYER:

Q. I think I know what you mean, but it really isn't clear.

Would you mind restating it?

MS. HALL: Maybe you could rephrase the question.

THE WITNESS: Let me hear the question again.

(WHEREUPON, the record was read by the reporter as requested.)

BY THE WITNESS:

A. I would not do so, that's correct.

MR. MEYER: Off the record.

(WHEREUPON, discussion was had off the record.)

MR. MEYER: One or two more questions.

BY MR. MEYER:

Q. Do you have any understanding whether KFS is prepared to reduce its management fees if the 12b-1 revision is approved by the shareholders today?

* * *

EXHIBIT C

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

| | | |
|----------------------------|---|---------------|
| JILL S. KAMEN, |) | |
| |) | |
| Plaintiff, |) | No. 85 C 4587 |
| |) | |
| v. |) | |
| |) | |
| KEMPER FINANCIAL SERVICES, |) | |
| INC., and CASH EQUIVALENT |) | |
| FUND, INC., |) | |
| |) | |
| Defendants. |) | |

The deposition of DONALD L. DUNAWAY, called by the Plaintiff for examination, taken pursuant to the Federal Rules of Civil Procedure of the United States District Courts pertaining to the taking of depositions, taken before MAYLEEN PETERS, a Notary Public within and for the County of Cook, State of Illinois, and a Certified Shorthand Reporter of said state, taken at Suite 4300, One IBM Plaza, Chicago, Illinois, on the 8th day of October, A.D. 1986, at 9:30 a.m.

* * *

[p. 21] BY MR. MEYER:

Q. Yes. And why did you do that?

A. Because in my view, it was in the best interest of the existing shareholders of the Fund to approve it.

Q. Are you familiar with the allegations in the lawsuit in which we are taking this testimony?

A. I think generally, yes.

Q. Are you aware of the lawsuit allegation that the fees presently being paid are excessive?

A. Yes.

Q. Are you also aware that there are allegations in the lawsuit concerning the adequacy of disclosures in the proxy statement?

A. My proxy statement? Do you mean this particular statement?

Q. No, the prior proxy statement.

I will give you the exact one.

(WHEREUPON, there was a short interruption.)

BY MR. MEYER:

Q. The proxy statement of September, 1984?

A. Yes.

Q. What is your view of the allegations in the [p. 22] complaint in those respects?

A. They are incorrect.

Q. So it is fair to say that if you were asked to bring an action against Kemper Financial Services with respect to the allegations in the complaint that you would refuse to do so?

MS. HALL: Would you read the question?

(WHEREUPON, the record was read by the reporter as requested.)

MS. HALL: I am going to object because of the hypothetical nature of the question and advise the witness not to answer.

BY MR. MEYER:

Q. And I take it you are following Ms. Hall's advice, is that right?

A. That's correct.

Q. You have been aware of the pendency of the present lawsuit for some time, is that correct?

A. I missed after aware in there.

Q. Pendency of the present lawsuit for some time.

A. Of its existence, yes.

Q. What action, if any, have you taken with respect to it?

[p. 23] A. What action? What action have I taken? None that I can think of.

Q. Well, did you as a director vote to retain counsel to represent the Fund?

A. Not that I recall.

Q. Did you discuss what position the Fund should take in the lawsuit?

A. Oh, discussed with whom?

MS. HALL: I will advise the witness that he should not answer that question insofar as it might call for conversations with counsel.

BY MR. MEYER:

Q. Excluding counsel, did you discuss, for example, with your co-directors what position the Fund should take in the lawsuit?

MS. HALL: And I would again advise the witness that if that conversation - if there were a conversation with co-directors and it took place during a conversation with counsel that you should not answer that question.

Are you now clear on the question and the objection?

THE WITNESS: And the advice?

MS. HALL: And the advice.

[p. 24] BY MR. MEYER:

Q. What is your answer?

A. I will take Miss Hall's advice.

Q. Well, were there any discussions with your fellow directors as to what position the Fund should take in the lawsuit?

MS. HALL: And, again, I advise you only to answer that question as to conversations with fellow directors which took place outside the presence of counsel.

MR. MEYER: The present question - first of all, I don't think your initial instruction was correct, but the present question asks only whether there were any such conversations.

MS. HALL: You may answer that question.

THE WITNESS: I'm sorry.

Miss, would you read the question back?

(WHEREUPON, the record was read by the reporter as requested.)

BY THE WITNESS:

A. It is not really clear to me what you mean by discussions.

BY MR. MEYER:

Q. Did it come up at a Board meeting or outside

• • •

EXHIBIT D

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JILL S. KAMEN,)
)
 Plaintiff,)
)
 vs.) No. 85 C 4587
)
 KEMPER FINANCIAL)
 SERVICES, INC., and CASH)
 EQUIVALENT FUND,)
)
 Defendants.)

The deposition of HARRY C. DeMUTH, called by the Plaintiff for examination, taken pursuant to the Federal Rules of Civil Procedure of the United States District Courts pertaining to the taking of depositions, taken

before MELANIE JAKUS, a Notary Public within and for the County of DuPage, State of Illinois, and a Certified Shorthand Reporter of said state, at Suite 4400, One IBM Plaza, Chicago, Illinois, on the 19th day of November, A.D. 1986, at 9:10 a.m.

* * *

[p. 58] A. I understand that somebody feels that the fees are too high. They knew what they were, but they think they are too high. They bought the fund nevertheless.

Q. Do you know whether or not there is any challenge to any proxy statements sent out by the fund?

A. I don't know what the details are of that. I saw that in the information that is presented in the prospectus. I am not familiar with the details of that.

Q. Did you ask KFS for its views of the merits of the action?

A. No, I did not.

Q. Did they give you their views of the merits of the action?

A. They discussed - presented to us - they told us of the fact that there was some litigation and have kept us informed as to the status of it.

Q. And what is your view, if any, of the merits of the litigation?

A. I am not a lawyer. I have no view whatever of that.

Q. Would you consider prosecuting the claims [p. 59] set forth in the litigation against KFS on behalf of the fund?

A. I don't know what the - don't know what they are. I don't know what the -

Q. You don't know what the claims are?

A. Well, the claims are the fees are too high.

Q. And you don't know what the proxy claims are?

A. The proxy claims - I don't know what you mean by proxy claims.

Q. You said you were aware that there were some claims with respect to a proxy statement.

A. I think the litigation is described in the prospectus in your hand.

Q. And that is the extent of your knowledge of it?

A. Yes. Yes.

MR. MEYER: I have no further questions.

FURTHER DEPONENT SAITH NOT.

EXHIBIT E
IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

| | | |
|--------------------------|---|---------------|
| JILL S. KAMEN, |) | |
| |) | |
| Plaintiff, |) | |
| |) | |
| vs. |) | No. 85 C 4587 |
| |) | |
| KEMPER FINANCIAL |) | |
| SERVICES, INC., and CASH |) | |
| EQUIVALENT FUND, |) | |
| |) | |
| Defendants. |) | |

The deposition of DAVID W. BELIN, called by the Plaintiff for examination, taken pursuant to the Federal Rules of Civil Procedure of the United States District Courts pertaining to the taking of depositions, taken before SUSAN M. MARTINO, a Notary Public within and for the County of Cook, State of Illinois, and a Certified Shorthand Reporter of said state, at Suite 4000, One IBM Plaza, Chicago, Illinois, on the 9th day of October, A.D. 1986, at 9:30 a.m.

* * *

[p. 44] litigation at the time of the 1986 increase. I have to be candid with you and tell you I don't think the litigation has any merit, but I was aware of it.

Q. You've seen the complaint, I take it?

A. I've sign the complaint. I've seen the - there is one clause that basically says, as I remember the complaint, something about having a misleading or insufficient information in the proxy statement concerning the

Kemper Money Market Fund. I happen to believe that that is specious.

But I understand that's not your opinion. That's my opinion. I've seen the complaint. With regard to - there is another portion that talks about the investment management fee being excessive. I believe and I think - I may be wrong by a few basis points, I think it's around 17 basis points or something and I think the fee is very reasonable particularly in light of the performance.

So I just really basically disagree as a representative of the independent shareholders that there is any merit, and I think for someone to say that it's misleading - because they refer to Kemper Money Market Fund. It says it has a top rate of 50 basis points and they should have given the whole [p. 45] complete gradation, I just think that's utterly without merit.

Q. So that if you had been asked directly to bring an action against KFS with respect to that claim, you would have refused, is that right?

MS. HALL: Hold your answer. I'm going to advise the witness not to answer that hypothetical question.

MR. MEYER: On what basis?

MS. HALL: On the basis that it's a hypothetical question. He's here to answer - not to answer hypothetical questions.

MR. MEYER: I take it you're following counsel's advice?

(WHEREUPON, discussion was had off the record between the witness and Ms. Hall out of

the hearing of other counsel and the court reporter.)

MS. HALL: I'll withdraw my objection.

BY THE WITNESS:

A. I better have the question back then.

MR. MEYER: I notice that the withdrawal of the objection comes after conference between counsel and [p. 46] the witness.

MS. HALL: The record will reflect that I have consulted with my client.

MR. MEYER: Would you read the question back?

(WHEREUPON, the record was read by the reporter as requested.)

BY THE WITNESS:

A. Not necessarily.

BY MR. MEYER:

Q. Are you telling me there is a chance you would have brought such an action?

A. I'm telling you that right now, I would have to give it some consideration as to whether I would or wouldn't.

Q. Well, you've had the complaint for almost two years and you've come up with the conclusion that the contention is specious.

What consideration is it that you would want to give to such a request?

A. Well, I guess if someone said it - if someone came to me as a shareholder and said that they believed there was some merit, at least I would give it some consideration.

Q. Well, you know that Jill Kamen is a [p. 47] shareholder, don't you?

A. I believe she is. She claims she is.

Q. And she has advanced the claim. Why is it that your reaction to the complaint would be different than your reaction to an informal communication?

A. Well, I'm telling you at least right now what my considered opinion is, and you've said if someone - your question basically - to go back to your specific question, saying I would automatically not do something. I guess I wouldn't automatically respond to it if that claim was brought up.

That's why I said not necessarily. I still believe that based upon at least what I perceive to be the reasonable - well, I'll call the reasonable and prudent shareholder, that this lawsuit really does not have any merit.

Q. Did you participate in any discussions concerning litigation strategy in this lawsuit?

MS. HALL: I'm going to advise the witness to exclude from his answer any conversations with counsel.

MR. MEYER: It's only a yes or no question at

* * *

EXHIBIT F**PART B****STATEMENT OF ADDITIONAL
INFORMATION**

December 1, 1985

CASH EQUIVALENT FUND120 South LaSalle Street, Chicago, Illinois 60603
(312) 332-6472

This Part B Statement of Additional information is not a prospectus. It should be read in conjunction with the prospectus of Cash Equivalent Fund (the "Fund") dated December 1, 1985. The prospectus may be obtained without charge from the Fund.

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The financial statements appearing in the Fund's 1985 Annual Report are incorporated herein by reference. The Fund's Annual Report accompanies this Statement of Additional Information.

INVESTMENT RESTRICTIONS

The Fund has adopted for the Money Market Portfolio and the Government Securities Portfolio certain investment restrictions which, together with the investment objective and policies of each Portfolio, cannot be changed for a Portfolio without approval by holders of a majority of its outstanding voting shares. As defined in the Investment Company Act of 1940, this means the lesser of the vote of (a) 67% of the shares of the Portfolio at a meeting where more than 50% of the outstanding shares are present in person or by proxy or (b) more than 50% of the outstanding shares of the Portfolio.

The Money Market Portfolio and the Government Securities Portfolio individually may not:

- (1) Purchase securities or make investments other than in accordance with its investment objective and policies.
- (2) Purchase securities of any issuer (other than obligations of, or guaranteed by, the United States Government, its agencies or instrumentalities) if, as a result, more than 5% of the value of the Portfolio's assets would be invested in securities of that issuer.
- (3) Purchase, in the aggregate with all other Portfolios, more than 10% of any class of securities of any issuer. All debt securities and all preferred stocks are each considered as one class.

(4) Invest more than 5% of the Portfolio's total assets in securities of issuers (other than obligations of, or guaranteed by, the United States Government, its agencies or instrumentalities) which with their predecessors have a record of less than three years continuous operation.

(5) Enter into repurchase agreements if, as a result thereof, more than 10% of the Portfolio's total assets valued at the time of the transaction would be subject to repurchase agreements maturing in more than seven days.

(6) Make loans to others (except through the purchase of debt obligations or repurchase agreements in accordance with its investment objective and policies).

(7) Borrow money except as a temporary measure for extraordinary or emergency purposes and then only in an amount up to one-third of the value of its total assets, in order to meet redemption requests without immediately selling any money market instruments (any such borrowings under this section will not be collateralized). If, for any reason, the current value of the Portfolio's total assets falls below an amount equal to three times the amount of its indebtedness from money borrowed, the Fund will, within three business days, reduce its indebtedness to the extent necessary. The Fund will not borrow for leverage purposes.

(8) Make short sales of securities, or purchase any securities on margin except to obtain such short-term credits as may be necessary for the clearance of transactions.

(9) Write, purchase or sell puts, calls or combinations thereof.

(10) Concentrate more than 25% of the value of the Portfolio's assets in any one industry; provided, however, that the Portfolio reserves freedom of action to invest up to 100% of its assets in certificates of deposit or bankers' acceptances or U.S. Government securities in accordance with its investment objective and policies.

(11) Purchase or retain the securities of any issuer if any of the officers or trustees of the Fund or its investment adviser owns beneficially more than $\frac{1}{2}$ of 1% of the securities of such issuer and together own more than 5% of the securities of such issuer.

(12) Invest more than 5% of the Portfolio's total assets in securities restricted as to disposition under the federal securities laws (except commercial paper issued under Section 4(2) of the Securities Act of 1933).

(13) Invest for the purpose of exercising control or management of another issuer.

(14) Invest in commodities or commodity futures contracts or in real estate, although it may invest in securities which are secured by real estate and securities of issuers which invest or deal in real estate.

(15) Invest in interests in oil, gas or other mineral exploration or development programs, although it may invest in the securities of issuers which invest in or sponsor such programs.

(16) Purchase securities of other investment companies, except in connection with a merger, consolidation, reorganization or acquisition of assets.

(17) Underwrite securities issued by others except to the extent the Fund may be deemed to be an underwriter,

under the federal securities laws, in connection with the disposition of portfolio securities.

(18) Issue senior securities as defined in the Investment Company Act of 1940.

If a percentage restriction is adhered to at the time of investment, a later increase or decrease in percentage beyond the specified limit resulting from a change in values or net assets will not be considered a violation.

The Fund did not borrow money as permitted by investment restriction number 7 in its latest fiscal year and has no present intention of borrowing during the coming year. In any event, borrowings will only be as permitted thereby.

INVESTMENT MANAGER AND SHAREHOLDER SERVICES

As stated in the prospectus, Kemper Financial Services, Inc. ("KFS") is the Fund's investment manager. Pursuant to an investment management agreement, KFS acts as the Fund's investment adviser, manages its investments, administers its business affairs, furnishes office facilities and equipment, provides clerical, bookkeeping and administrative services, provides shareholder and information services and permits any of its officers or employees to serve without compensation as trustees or officers of the Fund if elected to such positions. The Fund pays the expenses of its operations, including the fees and expenses of independent auditors, counsel, custodian and transfer agent and the cost of share certificates, reports and notices to shareholders, costs of calculating net asset value, brokerage commissions or transaction

costs, taxes, registration fees, the fees and expenses of qualifying the Fund and its shares for distribution under federal and state securities laws and membership dues in the Investment Company Institute or any similar organization.

The investment management agreement continues in effect from year to year so long as its continuation is approved at least annually by a majority of the trustees who are not parties to such agreement or interested persons of any such party except in their capacity as trustees of the Fund and by the shareholders or the Board of Trustees. It may be terminated at any time upon 60 days notice by either party, or by a majority vote of the outstanding shares of a Portfolio with respect to that Portfolio, and will terminate automatically upon assignment. Shares will be voted by Portfolio on the investment management agreement.

For the services and facilities furnished, the Fund pays an annual investment management fee, payable monthly, on a graduated basis of .22 of 1% of the first \$500,000,000 of average daily net assets, .20 of 1% on the next \$500,000,000, .175 of 1% on the next \$1 billion, .16 of 1% on the next \$1 billion and .15 of 1% on average daily net assets over \$3 billion. KFS has agreed to reimburse the Fund should all operating expenses of the Fund, including the investment management fee of KFS but excluding taxes, interest, extraordinary expenses (as determined by the Board of Trustees) and brokerage commissions or transaction costs, exceed .90 of 1% of the first \$500 million, .80 of 1% of the next \$500 million, .75 of 1% of the next \$1 billion and .70 of 1% of average daily net assets in excess of \$2 billion on an annual basis. In addition, the

Fund has undertaken to a state securities authority that expenses (with the aforesaid exclusions) will not exceed 25% of the Fund's total income while its shares are registered for sale in that state. The investment management fee and the expense limitation are computed based on average daily net assets of all Portfolios of the Fund managed by KFS and are allocated among such Portfolios based upon the relative net assets of each, and the net asset value of Fund shares is computed on a Portfolio by Portfolio basis. For its services as investment adviser and manager and for facilities furnished the Fund during the year ended July 31, 1985, the Fund incurred investment management fees aggregating \$7,710,000 for the Money Market Portfolio and \$781,000 for the Government Securities Portfolio. The Fund incurred investment management fees of \$6,792,000 and \$7,638,000 for the Money Market Portfolio and \$689,000 and \$839,000 for the Government Securities Portfolio for 1984 and 1983, respectively.

Pursuant to an administration, shareholder services and distribution agreement ("administration agreement"), KFS serves as primary administrator to the Fund to provide information and services for existing and potential shareholders. The administration agreement provides that KFS shall appoint various firms to provide a cash management service for their customers or clients through the Fund. The firms are to provide such office space and equipment, telephone facilities, personnel and literature distribution as is necessary or appropriate for providing information and services to the firms' clients. Terms of continuation, termination and assignment under this agreement are identical to those described above with regard to the investment management agreement,

except that termination other than upon assignment requires six months notice. For its services as primary administrator, the Fund pays KFS an annual fee, payable monthly, on a graduated basis of .33 of 1% of the first \$500 million of average daily net assets, .30 of 1% on the next \$500 million, .275 of 1% on the next \$1 billion, .265 of 1% on the next \$1 billion and .25 of 1% on average daily net assets over \$3 billion.

KFS has related services agreements with various firms to provide cash management and other services for the Fund shareholders. Such services and assistance may include, but not be limited to, establishment and maintenance of shareholder accounts and records, processing purchase and redemption transactions, providing automatic investment in Fund shares of client account balances, answering routine inquiries regarding the Fund, assisting clients in changing account options, designations and addresses, and such other services as may be agreed upon from time to time and as may be permitted by applicable statute, rule or regulation. KFS may enter into administration agreements with banking firms to provide the above listed services, except for certain distribution services which the banks may be prohibited from providing, for their clients who wish to invest in the Fund. KFS may also provide some of the above services for the Fund. KFS pays such firms at a minimum annual rate equal to .25 of 1% of average net assets of those accounts which they maintain and service. KFS may in its discretion pay these firms additional amounts up to the maximum administration fees attributable to accounts maintained by each such firm. It is the present intention of KFS that it will normally pay to the firms a majority of

the amount available for discretionary payments. However, KFS may also elect to keep a portion of the total administration fee to reimburse itself for functions performed for the Fund or to pay for sales materials or other promotional activities.

KFS may also enter into other related services agreements with other firms which will provide a more limited cash management service to their clients. Such services and assistance may include, but not be limited to, processing purchase and redemption transactions in Fund shares for firm clients, answering routine client inquiries regarding the Fund, providing assistance to clients in changing account options, designations and addresses, and such other services as may be agreed upon from time to time. KFS will pay each such firm a quarterly fee at the annual rate of .10 of 1% or .15 of 1% based on average aggregate assets in Fund accounts the firm services.

For the year ended July 31, 1985, the Fund incurred administration fees in the Money Market Portfolio and the Government Securities Portfolio of \$12,366,000 and \$1,252,000, respectively, of which KFS remitted \$12,060,000 and \$1,249,000 respectively, to various firms, including \$3,025,000 paid to broker-dealer firms affiliated with Kemper Corporation, pursuant to the related services agreements. Effective February 1, 1985, DST Systems, Inc., the Fund's shareholder service agent, entered into an agreement with KFS whereby KFS provides certain shareholder and transfer agency services for the Fund. For the six months ended July 31, 1985, KFS earned \$186,000 for services provided for the Fund.

KFS is the principal underwriter for shares of the Fund and acts as agent of the Fund in the sale of its shares. The Fund pays the cost for the prospectus and shareholder reports to be set in type and printed for existing shareholders, and KFS pays for the printing and distribution of copies thereof used in connection with the offering of shares to prospective investors. KFS also pays for supplementary sales literature and advertising costs. Terms of continuation, termination and assignment under the underwriting agreement are identical to those described above with regard to the investment management agreement, except that termination other than upon assignment requires six months notice.

Messrs. Anderson, Harding, Kierscht, Wilson, Williams, Cole, Buecking, Rachwalski, Duffy and Engling are also directors or officers of KFS as indicated under "Officers and Trustees."

Custodian. The United Missouri Bank of Kansas City, N.A., Tenth and Grand, Kansas City, Missouri, as custodian has custody of all securities and cash of the fund; and it attends to the collection of principal and income, and payment for and collection of proceeds of securities bought and sold by the Fund.

Accountants and Reports to Shareholders. The Fund's independent public accountants are Arthur Young & Company, One IBM Plaza, Chicago, Illinois 60611, who audit and report on the Fund's annual financial statements, review certain regulatory reports and the Fund's federal income tax return, and perform other professional accounting, auditing, tax and advisory services when engaged to do so by the Fund. Shareholders will receive

annual audited financial statements and semi-annual unaudited financial statements.

PORTFOLIO TRANSACTIONS

Portfolio transactions are undertaken principally to pursue the Fund's objective in relation to movements in the general level of interest rates, to invest money obtained from the sale of Fund shares, to reinvest proceeds from maturing portfolio securities and to meet redemptions of Fund shares. This may increase or decrease the yield of the Fund depending upon management's ability to correctly time and execute such transactions. Since the Fund's assets will be invested in securities with short maturities, its portfolio will turn over several times a year. Since securities with maturities of less than one year are excluded from required portfolio turnover rate calculations, each Portfolio's portfolio turnover rate for reporting purposes will be zero.

KFS, in effecting purchases and sales of portfolio securities for the account of the Fund, will implement the Fund's policy of seeking the best execution of orders. The Fund expects that purchases and sales of securities for the Fund's Portfolios usually will be principal transactions. Portfolio securities will normally be purchased directly from the issuer or from an underwriter or market maker for the securities. There usually will be no brokerage commissions paid by the Fund for such purchases. Purchases from underwriters will include a commission or concession paid by the issuer to the underwriter, and purchases from dealers serving as market makers will include the spread between the bid and asked prices. The

primary consideration in the allocation of transactions is prompt execution of orders in an effective manner at the most favorable price.

The investment decisions for the Fund are reached independently from those for other accounts managed by KFS. Such other accounts may also make investments in instruments or securities at the same time as the Fund. When two or more accounts have funds available for investment in similar instruments, available instruments are allocated as to amount in a manner considered equitable to each. In some cases this procedure may affect the size or price of the position obtainable for the Fund. However, it is the opinion of the Board of Trustees that the benefits available because of KFS' organization outweigh any disadvantages that may arise from exposure to simultaneous transactions.

Kemper Corporation owns all the outstanding stock of KFS. Kemper Corporation or affiliates also own broker-dealer firms ("affiliated broker-dealers"). No portfolio transactions are executed for the Fund with or through any affiliated broker-dealers. The Fund may purchase securities from other members of an underwriting syndicate of which an affiliated broker-dealer is a participant, but only under conditions set forth in applicable rules of the Securities and Exchange Commission and in accordance with procedures adopted and reviewed periodically by the Board of Trustees.

PURCHASE AND REDEMPTION OF SHARES

Fund shares are sold at their net asset value next determined after an order and payment are received in the

form described in the Fund's prospectus. The minimum initial investment is \$1,000 and the minimum subsequent investment is \$100 but such minimum amounts may be changed at any time. The Fund may waive the minimum for purchases by trustees, directors, officers or employees of the Fund or KFS. An investor wishing to open an account should use the Account Information Form available from the Fund, investment dealers or other firms.

Upon receipt by DST Systems, Inc., the Fund's shareholder service agent, of a request for redemption, shares will be redeemed by the Fund at the applicable net asset value as described in the Fund's prospectus. If effected at the close of the New York Stock Exchange ("Exchange") the shareholder will receive that day's dividend. A shareholder may elect to use either the regular or expedited redemption procedures.

If shares to be redeemed were purchased by check, the Fund may delay transmittal of redemption proceeds until such time as it has assured itself that good payment has been collected for the purchase of such shares, which will generally be within 15 days. Shareholders may not use expedited redemption procedures (wire transfer or Redemption Draft) until the shares being redeemed have been on the Fund's books for at least 15 days. If shares being redeemed were originally purchased by wiring Federal Funds such delay will be eliminated. Shareholders redeeming shares by expedited wire redemption request between 11 a.m. and 1 p.m. can request to receive the net asset value calculated at 1 p.m. in which case they would not receive that day's dividend. The wire will still be sent on the next business day.

The Fund may suspend the right of redemption or delay payment more than seven days (a) during any period when the Exchange is closed (other than customary week-end and holiday closings), (b) when trading in the markets the Fund normally utilizes is restricted, or an emergency exists as determined by the Securities and Exchange Commission so that disposal of the Fund's investments or determination of its net asset value is not reasonably practicable, or (c) for such other periods as the Securities and Exchange Commission by order may permit for protection of the Fund's shareholders.

DIVIDENDS AND STANDARD YIELD CALCULATIONS

Dividends. On each day that the New York Stock Exchange ("Exchange") is open, each Portfolio's net investment income will be declared at the close of the Exchange as a daily dividend to shareholders of record prior to the close of the Exchange. Shareholders will receive dividends in additional shares unless they elect to receive cash. Dividends will be reinvested monthly at the net asset value on the fifteenth day of each month if a business day, otherwise on the next business day. If cash payment is requested, checks will be mailed within five business days after the above described date. If a shareholder redeems his entire account, all dividends accrued to the time of the redemption will be paid to him not later than the next dividend payment date.

Each Portfolio calculates its dividends based on its daily net investment income. For this purpose, the net investment income of the Portfolio consists of (1) accrued interest income plus or minus amortized purchase discount or

premium, (2) plus or minus all short-term realized and unrealized gains and losses on investments and (3) minus accrued expenses allocated to the Portfolio. Expenses of the Fund are accrued each day. While each Portfolio's investments are valued at amortized cost, there will be unrealized gains or losses on such investments. However, should the net asset value deviate significantly from market value, the Board of Trustees could decide to value the investments at market value and then unrealized gains and losses would be included in (2) above.

Dividends are reinvested monthly and shareholders will receive monthly confirmation of dividends and of purchase and redemption transactions.

Standard Yield Calculations. Each Portfolio's standard yield quotations as they appear in advertising and sales materials are calculated by a standard method prescribed by rules of the Securities and Exchange Commission. Under that method, the current yield quotation is based on a seven day period and computed as follows: Each Portfolio's net investment income per share (accrued interest on portfolio securities, plus or minus amortized purchase discount or premium, less accrued expenses) is divided by the price per share (expected to remain constant at \$1.00) during the period ("base period return") and the result is divided by 7 and multiplied by 365 and the current yield figure carried to the nearest one-hundredth of one percent. Realized capital gains or losses and unrealized appreciation or depreciation of the Fund's portfolio are not included in the calculation. The compounded effective yield is determined by taking the base

period return and calculating the effect of assumed compounding. [The formula for the compounded effective yield is $(\text{based period return} + 1)^{365/7-1}$.]

Each Portfolio's yield fluctuates; and the publication of an annualized yield quotation is not a representation as to what an investment in either Portfolio will actually yield for any given future period. Actual yields will depend not only on changes in interest rates on money market instruments during the period in which the investment in either Portfolio is held, but also on such matters as any realized gains and losses and changes in Portfolio expenses.

OFFICERS AND TRUSTEES

The officers and trustees of the Fund, their principal occupations for the last five years and their affiliations, if any, with Kemper Financial Services, Inc., are as follows:

CHARLES M. KIERSCHT, President and Trustee*, 120 South LaSalle Street, Chicago; President, Chief Operating Officer and Director, Kemper Financial Services, Inc.

THOMAS R. ANDERSON, Vice President and Trustee*, 120 South LaSalle Street, Chicago; Chairman, Chief Executive Officer and Director, Kemper Financial Services, Inc.; Senior Vice President and Director, Kemper Corporation and Lumbermens Mutual Casualty Company; Director or Officer of various Kemper Group Companies

DAVID W. BELIN, Trustee, 2000 Financial Center, 7th and Walnut, Des Moines, Iowa; Partner, Belin, Harris, Helmick, Heartney & Tesdell, Attorneys

LEWIS A. BURNHAM, Trustee, 5610 LaSalle Street, Tampa, Florida; Executive Vice President, Anchor Glass Container Company

HARRY C. DeMUTH, Trustee, 9515 Seymour, Schiller Park, Illinois; Chairman and Director, DeMuth Steel Products Company

DONALD L. DUNAWAY, Trustee, 3533 North 27th Street, Milwaukee, Wisconsin; Senior Vice President, A.O. Smith Corporation

JAMES W. HARDING, Trustee*, 120 South LaSalle Street, Chicago; retired, formerly President and Director, Kemper Corporation; Director, Kemper Financial Services, Inc.

ROBERT B. HOFFMAN, Trustee, 50 Cedar Street, Chicago; Vice President and Chief Financial Officer, Staley Continental, Inc.; formerly Executive Vice President, Castle and Cooke, Inc.; formerly Vice President - Finance, FMC Corporation

THOMAS L. MARTIN, JR., Trustee, 3300 South Federal Street, Chicago; President, Illinois Institute of Technology

WILLIAM P. SOMMERS, Trustee, 555 California Street, San Francisco, California; Executive Vice President and Director, Booz, Allen & Hamilton Inc.

GORDON P. WILSON, Vice President*, 120 South LaSalle Street, Chicago; Executive Vice President, Chief Investment Officer and Director, Kemper Financial Services, Inc.

THOMAS V. WILLIAMS, JR., Vice President*, 120 South LaSalle Street, Chicago; Senior Vice President, Kemper Financial Services, Inc.

GERALD M. COLE, Vice President*, 120 South LaSalle Street, Chicago; Senior Vice President, Kemper Financial Services, Inc.

WILLIAM R. BUECKING, Vice President*, 120 South LaSalle Street, Chicago; Senior Vice President and Director of the Fixed Income Department, Kemper Financial Services, Inc.

FRANK J. RACHWALSKI, Vice President*, 120 South LaSalle Street, Chicago; Vice President, Kemper Financial Services, Inc.

JOHN STUEBE, Vice President*, 120 South LaSalle Street, Chicago; Portfolio Manager, Kemper Financial Services, Inc.

CHARLES F. CUSTER, Vice President and Assistant Secretary*, 115 South LaSalle Street, Chicago; Partner, Vedder, Price, Kauffman & Kammholz, Attorneys, Legal Counsel to the Fund

JEROME L. DUFFY, Treasurer*, 120 South LaSalle Street, Chicago; Vice President, Kemper Financial Services, Inc.

ROBERT J. ENGLING, Vice President and Secretary*, 120 South LaSalle Street, Chicago; Attorney, Senior Vice President, Secretary and General Counsel, Kemper Financial Services, Inc.

*Interested persons as defined in the Investment Company Act of 1940.

The officers and trustees of the Fund serve in similar capacities with other Kemper Mutual Funds. The trustees and officers affiliated with KFS receive no compensation from the Fund. The Fund paid or accrued total directors' fees of approximately \$48,000 for the year ended July 31,

1985 to those trustees who are not designated above as "interested persons." Certain of these trustees have entered into deferred compensation agreements with the Fund under which payment of the current fees is deferred. Deferred amounts accrue interest each fiscal quarter at the 90-day U.S. Treasury Bill rate in effect at the beginning of such quarter. On August 31, 1985 the officers and trustees of the Fund, as a group, owned less than 1% of the then outstanding shares of the Fund and no person owned of record 5% or more of the Fund's outstanding shares.

SPECIAL FEATURES

Exchange Privilege

Shares of the listed Kemper Mutual Funds may be exchanged for each other at relative net asset values. However, shares of the funds designated* which were acquired by direct investment are subject to the applicable sales charge on exchange. Shares of the funds designated † which were acquired by direct investment must be held for 6 months before they may be exchanged. Shares acquired by purchase transactions may not be exchanged until they have been owned at least 15 days. The exchange privilege is not a right and may be denied or modified. Kemper California Tax-Free Income Fund, Inc. is available on exchange only to California residents.

Technology Fund, Inc.

Kemper Total Return Fund, Inc.

Kemper Growth Fund, Inc.

Kemper Summit Fund, Inc.

Kemper International Fund, Inc.

Kemper Option Income Fund, Inc.

† Kemper Municipal Bond Fund, Inc.

† Kemper Income and Capital Preservation Fund, Inc.

† Kemper U.S. Government Securities Fund, Inc.

† Kemper High Yield Fund, Inc.

† Kemper California Tax-Free Income Fund, Inc.

*Kemper Money Market Fund

*Kemper Government Money Market Fund

*Cash Equivalent Fund

*Tax-Exempt Money Market Fund, Inc.

The total value of shares being exchanged must at least equal the minimum investment requirement of the fund into which they are being exchanged. Exchanges are made based on relative dollar values of the shares involved in the exchange. There is no service fee for an exchange; however, dealers may charge for their services in expediting exchange transactions. Exchanges will be effected by redemption of shares of the fund held and purchase of shares of the other fund. For Federal income tax purposes, any such exchange constitutes a sale upon which a gain or loss will be realized, depending upon whether the value of the shares being exchanged is more or less than the shareholder's adjusted cost basis. Shareholders interested in exercising the exchange privilege may obtain an exchange form and prospectuses of the other funds from investment dealers or KFS. Exchanges may also be authorized by telephone if a preauthorized exchange form, available from KFS, is on file with DST. The exchange privilege may be modified or discontinued at any time.

Systematic Withdrawal Program

The owner of \$5,000 or more of a Portfolio's shares may provide for the payment from his account of any requested dollar amount to be paid to him or his designated payee monthly, quarterly or annually. Dividend distributions will be automatically reinvested at net asset value on the record-reinvestment date. A sufficient number of full and fractional shares will be redeemed to make the designated payment. Depending upon the size of the payments requested, redemptions for the purpose of making such payments may reduce or even exhaust the account. The program may be amended on thirty days notice by the Fund and may be terminated at any time by the shareholder or the Fund.

Retirement Programs

Individual Retirement Accounts ("IRA's") are available for individuals whether or not they are active participants in any other tax-qualified employer plan. Individuals may contribute and deduct from gross income up to 100% of compensation received during a year or \$2,000, whichever is less. Earnings on amounts held in IRA's accumulate tax deferred. However, there is a 10% penalty on withdrawals before age 59½, unless disabled. Investors Fiduciary Trust Company, P.O. Box 1356, Kansas City, Missouri 64141, has agreed to act as trustee for IRA's which invest in the Fund and utilize IRS Form 5305 for a fee of \$10 a year.

Certain employers may provide retirement benefits for employees and minimize federal filing and reporting requirements by adopting a Simplified Employee Pension

Plan ("SEP") under which an employer may make tax-deductible contributions to IRA's established by its employees. The maximum amount which may be contributed by an employer for an employee is the lesser of 15% of compensation or \$30,000. In addition, each employee may contribute his own tax-deductible contribution of up to \$2,000 as described above.

An employer who has established a pension or profit-sharing plan for employees may purchase Fund shares for such a plan. Forms and additional information for those individuals and institutions wishing to purchase shares of the Fund in conjunction with a tax-deferred retirement plan are available through the Fund to be used as a guide for the investor's own tax adviser.

Automatic Investment Programs

A shareholder may provide for periodic payment of designated amounts (\$25 minimum) from his checking account with a bank to his existing fund account. There is no charge for this service.

Shareholder, whose bank is a member of an automated clearing house may be able to have paychecks automatically invested in Fund shares each pay period.

SHAREHOLDER RIGHTS

The Fund is generally not required to hold meetings of its shareholders. Under the Agreement and Declaration of Trust of the Fund ("Declaration of Trust"), however, shareholder meetings will be held in connection with the following matters: (1) the election or removal of trustees

if a meeting is called for such purpose; (2) the adoption of any contract for which approval is required by the 1940 Act; (3) any termination of the Fund to the extent and as provided in the Declaration of Trust; (4) any amendment of the Declaration of Trust (other than amendments changing the name of the Fund or any Portfolio, supplying any omission, curing any ambiguity or curing, correcting or supplementing any defective or inconsistent provision thereof); (5) as to whether a court action, proceeding or claim should or should not be brought or maintained derivatively or as a class action on behalf of the Fund or the shareholders, to the same extent as the stockholders of a Massachusetts business corporation; and (6) such additional matters as may be required by law, the Declaration of Trust, the By-laws of the Fund, or any registration of the Fund with the Securities and Exchange Commission or any state, or as the trustees may consider necessary or desirable. The shareholders also would vote upon changes in fundamental investment objectives, policies or restrictions.

Each trustee serves until the next meeting of shareholders, if any, called for the purpose of electing trustees and until the election and qualification of his successor or until such trustee sooner dies, resigns, retires or is removed by a majority vote of the shares entitled to vote (as described below) or a majority of the trustees. In accordance with the 1940 Act (i) the Fund will hold a shareholder meeting for the election of trustees at such time as less than a majority of the trustees have been elected by shareholders, and (ii) if, as a result of a vacancy in the Board of Trustees, less than two-thirds of

the trustees have been elected by the shareholders, that vacancy will be filled only by a vote of the shareholders.

Trustees may be removed from office by a vote of the holders of a majority of the outstanding [sic] shares at a meeting called for that purpose, which meeting shall be held upon the written request of the holders of not less than 10% of the outstanding shares. Upon the written request of ten or more shareholders who have been such for at least six months and who hold shares constituting at least 1% of the outstanding shares of the Fund stating that such shareholders wish to communicate with the other shareholders for the purpose of obtaining the signatures necessary to demand a meeting to consider removal of a trustee, the Fund has undertaken to disseminate appropriate materials at the expense of the requesting shareholders.

The Declaration of Trust provides that the presence at a shareholder meeting in person or by proxy of at least 30% of the shares entitled to vote on a matter shall constitute a quorum. Thus, a meeting of shareholders of the Fund could take place even if less than a majority of the shareholders were represented on its scheduled date. Shareholders would in such a case be permitted to take action which does not require a larger vote than a majority of a quorum, such as the election of trustees and ratification of the selection of auditors. Some matters requiring a larger vote under the Declaration of Trust, such as termination or reorganization of the Fund and certain amendments of the Declaration of Trust, would not be affected by this provision; nor would matters which under the 1940 Act require the vote of a "majority of the outstanding voting securities" as defined in the 1940 Act.

The Declaration of Trust specifically authorizes the Board of Trustees to terminate the Fund (or any Portfolio) by notice to the shareholders without shareholder approval.

Under Massachusetts law, shareholders of a Massachusetts business trust could, under certain circumstances, be held personally liable for obligations of the Fund. The Declaration of Trust, however, disclaims shareholder liability for acts or obligations of the Fund and requires that notice of such disclaimer be given in each agreement, obligation, or instrument entered into or executed by the Fund or the trustees. Moreover, the Declaration of Trust provides for indemnification out of Fund property for all losses and expenses of any shareholder held personally liable for the obligations of the Fund and Fund will be covered by insurance which the trustees consider adequate to cover foreseeable tort claims. Thus, the risk of a shareholder incurring financial loss on account of shareholder liability is considered remote, since it is limited to circumstances in which a disclaimer is inoperative and the Fund itself is unable to meet its obligations.

The law firm of Ropes & Gray, Boston, Massachusetts, which supervised the organization of the Fund under Massachusetts law, is of the opinion that, pursuant to Massachusetts law, shareholders will not be liable personally for contract claims made under any agreement, obligation or undertaking governed by Massachusetts law and containing such disclaimer or when adequate notice is otherwise given.

Appendix

COMMERCIAL PAPER RATINGS

A-1, A-2 and Prime-1, Prime-2 Commercial Paper Ratings

Commercial paper rated by Standard & Poor's Corporation has the following characteristics: Liquidity ratios are adequate to meet cash requirements. Long-term senior debt is rated "A" or better. The issuer has access to at least two additional channels of borrowing. Basic earnings and cash flow have an upward trend with allowance made for unusual circumstances. Typically, the issuer's industry is well established and the issuer has a strong position within the industry. The reliability and quality of management are unquestioned. Relative strength or weakness of the above factors determine whether the issuer's commercial paper is rated A-1, A-2 or A-3.

The ratings Prime-1 and Prime-2 are the two highest commercial paper ratings assigned by Moody's Investors Service, Inc. Among the factors considered by them in assigning ratings are the following: (1) evaluation of the management of the issuer; (2) economic evaluation of the issuer's industry or industries and an appraisal of speculative-type risks which may be inherent in certain areas; (3) evaluation of the issuer's products in relation to competition and customer acceptance; (4) liquidity; (5) amount and quality of long-term debt; (6) trend of earnings over a period of ten years; (7) financial strength of a parent company and the relationships which exist with the issuer; and (8) recognition by the management of obligations which may be present or may arise as a result of public interest questions and preparations to meet such

obligations. Relative strength or weakness of the above factors determines whether the issuer's commercial paper is rated Prime-1, 2 or 3.

STANDARD & POOR'S BOND RATINGS, CORPORATE BONDS

AAA. This is the highest rating assigned by Standard & Poor's to a debt obligation and indicates an extremely strong capacity to pay principal and interest.

AA. Bonds rated AA also qualify as high-quality debt obligations. Capacity to pay principal and interest is very strong, and in the majority of instances they differ from AAA issues only in small degree.

A. Bonds rated A have a strong capacity to pay principal and interest, although they are somewhat more susceptible to the adverse effects of changes in circumstances and economic conditions.

MOODY'S BOND RATINGS

Aaa. Bonds which are rated Aaa are judged to be of the best quality. They carry the smallest degree of investment risk and are generally referred to as "gilt-edge." Interest payments are protected by a large or by an exceptionally stable margin and principal is secure. While the various protective elements are likely to change, such changes as can be visualized are most unlikely to impair the fundamentally strong position of such issues.

Aa. Bonds which are rated Aa are judged to be of high quality by all standards. Together with the Aaa group they comprise what are generally known as high grade

bonds. They are rated lower than the best bonds because margins of protection may not be as large as in Aaa securities or fluctuation of protective elements may be of greater amplitude or there may be other elements present which make the long term risks appear somewhat larger than in Aaa securities.

A. Bonds which are rated A possess many favorable investment attributes and are to be considered as upper medium grade obligations. Factors giving security to principal and interest are considered adequate but elements may be present which suggest a susceptibility to impairment sometime in the future.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

| | | |
|-------------------------|---|----------------|
| JILL S. KAMEN, |) | |
| |) | |
| Plaintiff, |) | |
| |) | No. 85 C 4587 |
| v. |) | Judge Nordberg |
| |) | |
| KEMPER FINANCIAL |) | |
| SERVICES, INC. and CASH |) | |
| EQUIVALENT FUND, INC., |) | |
| Defendants. |) | |

KEMPER FINANCIAL SERVICES, INC.'S RESPONSE
TO PLAINTIFF'S MOTION FOR RECONSIDERATION

Kemper Financial Services, Inc. ("KFS"), by its attorneys, submits this response to the plaintiff's motion to reconsider the February 2, 1987 memorandum opinion and order entered by this Court. For the reasons set forth below, this motion should be denied.

I. Introduction and Legal Standard.

On February 2, 1987, this Court entered an order dismissing plaintiff's claim under Section 20(a) of the Investment Company Act, 15 U.S.C. § 80a-20(a), for failure to make a demand upon the Board of Directors, and striking her jury demand. In a 23 page opinion, this Court addressed all of the issues that had been raised by counsel in their briefs and other written submissions to the Court. Notwithstanding this thorough opinion, and with no attention to the detailed reasoning expressed in the Court's opinion, plaintiff has filed a motion for reconsideration. Plaintiff's motion is plainly without merit.

The law is well established that a motion for reconsideration should be granted only when the Court's decision is clearly erroneous or a significant change has occurred in the law or facts. *Refrigeration Sales Co. v. Mitchell-Jackson Co.*, 605 F.Supp. 6, 7 (N.D. Ill. 1983); *Instituto Nacional v. Continental Illinois National Bank and Trust Company of Chicago*, 576 F. Supp. 991, 1001 (N.D. Ill. 1984); *Polys v. National Broadcasting Co.*, No. 80 C 2475, slip op. at 1-2 (N.D. Ill. February 4, 1985) (attached as Exhibit A). Plaintiff cannot merely rehash old arguments already rejected by the Court. *Id.*; *Above the Belt, Inc. v. Mel Bohannon Roofing, Inc.*, 99 F.R.D. 99, 101 (E.D.Va. 1983). Under these standards, plaintiff's motion clearly lacks any validity.

II. This Court Properly Dismissed The Section 20(a) Claim.

Because plaintiff failed to make a demand upon the Board of Directors and because plaintiff's complaint failed to allege with specificity, as required by Rule 23.1 of the Federal Rules of Civil Procedure, any reason for not making a demand, this Court correctly dismissed plaintiff's claim under Section 20(a) of the Investment Company Act.

Plaintiff now argues that this Court erred in finding that her allegations regarding the futility of making a demand were "conclusory" or "mere speculation." (Pl.Mem. p. 1-2, quoting the Court's opinion at p. 18). However, plaintiff makes no reference to the allegations in her complaint, which are the only matters relevant to

the motion to dismiss. Rather, plaintiff quotes from transcripts containing deposition testimony of various outside directors. This testimony is irrelevant. As this Court noted, "Kamen thrust the Fund into an adversary role when she instituted this action" (opinion, p. 19), and the fact that the Directors now disagree with her allegations is of no significance.

On December 8, 1986, plaintiff filed a supplemental amended complaint. At that time, the depositions of the outside directors had been completed. However, the supplemental amended complaint added no allegation with respect to the futility of making a demand. Undoubtedly, plaintiff's counsel recognized at that time, and knows now, that the deposition testimony is not relevant to this issue. Plaintiff's motion to reconsider is without merit and merely is designed to increase the defendant's costs in defending this action.

Moreover, the relevant question in deciding whether a demand is futile is not whether the directors would have agreed with the plaintiff, but whether the disinterested directors would have acted fairly in evaluating the merits of plaintiff's allegations. The purpose of Rule 23.1 is to insure that the decision to initiate litigation is made by the Board of Directors and not by an individual shareholder. (Opinion, p. 13); *Hawes v. City of Oakland*, 104 U.S. 450, 460 (1882). Plaintiff has failed to present any specific fact demonstrating that the disinterested directors would have been biased, unfair or incapable of exercising independent judgment in considering her allegations of wrongdoing, if those allegations properly

had been presented to the Board of Directors.¹ This Court correctly dismissed the § 20(a) claim for failure to make a demand on the Board of Directors.

III. This Court Properly Struck The Jury Demand

Plaintiff's argument with respect to the Court's determination to strike the jury demand also is without merit. Plaintiff makes no effort to explain why this Court should not have followed the rulings in *In re Evangelist*, 760 F.2d 27 (1st Cir. 1985) and *In re Gartenberg*, 636 F.2d 16 (2d Cir. 1980), the two decisions directly on point. Instead, plaintiff refers to language in *Curtis v. Loether*, 415 U.S. 189 (1974) and asserts that "the relief sought" is a most important factor to consider in determining whether to grant a jury trial. (Pl.Mem. p.4). Clearly, the language in *Curtis* does not overrule *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 477-78 (1962), where the Court stated that "the constitutional right to a trial by jury cannot be made to depend on the choice of words used in the pleadings."

In fact, the opinion in *Curtis v. Loether* is consistent with *Dairy Queen* and with this Court's opinion which plaintiff now seeks to have set aside. *Curtis* was an action for actual and punitive damages based on alleged housing discrimination, which the Court noted "sounds basically in tort." 415 U.S. at 195. Thus, regardless of how

¹ Indeed, the deposition testimony of Director David W. Belin specifically demonstrates the willingness of the Board to consider any shareholder complaint. Mr. Belin stated, "if someone came to me as a shareholder and said that they believed there was some merit, at least I would give it some consideration." Belin Tr. p. 46, attached to Pl.Mem. at Ex. E.

the relief was denominated by the plaintiff the Court recognized the relief sought as "the traditional form of relief offered in the courts of law." *Id.* at 196. Moreover, this Court addressed the issues raised by *Curtis* (which was cited extensively at pages 15-16 in plaintiff's brief filed on July 23, 1985) in its opinion. (Opinion pp. 22-23). This Court examined the relief actually being sought - restitution of any excessive fees - and found this to be relief traditionally addressed by courts of equity. Although the relief requested is a major factor in determining whether the right to a jury trial exists, restitutionary relief for the breach of a fiduciary duty is equitable in nature and is not transformed by using the word "damages" in the prayer for relief. To hold otherwise would make the constitutional right to a jury depend upon the language in the complaint.

CONCLUSION

Plaintiff's motion to reconsider is without any merit. No significant change in the law or facts has occurred and this Court's decision is not clearly erroneous. Indeed, the opinion is in accord with applicable law and precedent. Because the motion attempts to reargue points which were addressed in this Court's opinion and because it plainly does not meet the established legal

standards for a motion for reconsideration, the motion should be denied.

Respectfully submitted,
KEMPER FINANCIAL
SERVICES, INC.

By Joan M. Hall
One of Its Attorneys

Joan M. Hall
Joel T. Pelz
Kristen E. Lehker
JENNER & BLOCK
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350

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